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# Delegation in Immigration Law

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# Delegation in Immigration Law

Adam B. Cox<sup>†</sup> & Eric A. Posner<sup>††</sup>

*Immigration law both screens migrants and regulates the behavior of migrants after they have arrived. Both activities are information intensive because the migrant's "type" and the migrant's post-arrival activity are often forms of private information that are not immediately accessible to government agents. To overcome this information problem, the national government can delegate the screening and regulating functions. American immigration law, for example, delegates extensive authority to both private entities—paradigmatically, employers and families—and to the fifty states. From the government's perspective, delegation carries with it benefits and costs. On the benefit side, agents frequently have easy access to information about the types and activities of migrants and can cheaply monitor and control them. On the cost side, agents' preferences are not always aligned with those of the national government. The national government can ameliorate these costs by giving agents incentives to act consistently with the government's interests. Understanding these virtues and vices of delegation sheds light on longstanding debates about the roles that employers, families, and states play in American immigration law.*

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## INTRODUCTION

American immigration law is widely understood to consolidate power in the political branches of the national government. The field's central jurisprudential feature—the doctrine of immigration “plenary power”—is taken to stand for the proposition that the federal government has nearly unfettered authority to decide which migrants to admit into and deport from the United States.<sup>1</sup> This authority is embodied in the Immigration and Nationality Act<sup>2</sup> (INA), a prolix code that appears to describe in painstakingly intricate detail the rules that govern the screening and conduct of immigrants. And this power is jealously guarded by the federal government: when Arizona recently enacted its own immigration-related legislation, the United States took the nearly

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<sup>1</sup> See, for example, *Chae Chan Ping v United States*, 130 US 581, 609 (1889) (explaining that the power to exclude foreigners belongs to the federal government as a result of the constitution's delegation of sovereignty). See also Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S Ct Rev 255, 255 (“In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.”); Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in David A. Martin and Peter H. Schuck, eds, *Immigration Stories* 7, 7 (Foundation 2005).

<sup>2</sup> Pub L No 82-414, 66 Stat 163 (1952), codified as amended at 8 USC § 1101 et seq.

unprecedented step of suing the state, arguing that Arizona's statute could not stand because the national government holds *exclusive* authority over the admission of immigrants.<sup>3</sup> Given these features, it is unsurprising that American immigration law is seldom thought to involve significant delegation, to actors outside the federal government, of the core power to decide who gets to live in the United States. In fact, some scholars have argued that the nature of the immigration plenary power is such that the federal government may be constitutionally prohibited from delegating its authority to other actors.<sup>4</sup>

Despite this conventional wisdom, this Article demonstrates that delegation is pervasive in American immigration law. The federal government rarely makes decisions on its own about which immigrants should be admitted. Instead, it delegates to agents outside the federal government tremendous power to select the "types" of migrants who are admitted—to make admissions decisions based on the nature of their labor-market skills, the level of their language proficiency, their likelihood of success in the United States, and so forth.<sup>5</sup> Even more surprisingly, it also delegates significant power to these agents to control migrants once they arrive in the country and to decide whether they should be deported.<sup>6</sup>

In theory these immigration decisions could be given over to any of a vast number of possible agents, ranging from individual citizens, to private organizations like universities and religious organizations, to international entities or perhaps even other nations. And while many different agents do play some role in American immigration law, two prominent private agents stand out—employers and families. Employers are given wide powers to choose which foreign workers will be awarded coveted labor-migration visas. They often also have the power to remove those workers from the country.

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<sup>3</sup> See Complaint, *United States v Arizona*, No 10-01413, \*8-9 (D Ariz filed July 6, 2010) (available on Westlaw at 2010 WL 2653363) ("Congress [] holds exclusive authority for establishing alien status categories and setting the conditions of aliens' entry and continued presence."). The federal government's position was vindicated by the Supreme Court, which struck down core provisions of the Arizona statute. See *Arizona v United States*, 132 S Ct 2492 (2012).

<sup>4</sup> See, for example, Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 NYU L Rev 493, 532-49 (2001).

<sup>5</sup> In most cases, the federal government does set the overall numerical limits on migration, even as it delegates significant power to pick among different prospective migrants. In some cases, however, the agents are empowered to select migrants who are exempt from the quota system—and in this way alter the overall number of migrants admitted. See 8 USC § 1153(a). See also text accompanying notes 103-06.

<sup>6</sup> Even within the federal government there are large-scale delegations to the president that have often been overlooked by immigration scholars. For an extended discussion of the importance of this delegation, see Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L J 458, 460-61 (2009).

Similarly, the federal government delegates to family members the power to select immigrants by filing petitions on behalf of their foreign-born spouses, children, and other relatives—who, without the sponsoring family member's petition, could never legally migrate to the United States.

Moreover, in addition to these private agents the federal government often delegates significant screening and regulatory authority over immigrants to states and local governments. This basic fact has been overlooked in the controversy surrounding *Arizona v United States*,<sup>7</sup> in which the US government challenged an Arizona law criminalizing certain US immigration law violations.<sup>8</sup> Many commentators argued that Arizona violated basic federalism principles by engaging in migration-related enforcement activity that lies outside the authority of the states.<sup>9</sup> But while the United States was suing Arizona on that very theory, it was simultaneously rolling out new regulatory initiatives that delegated significant immigration enforcement authority to local law enforcement officials in Arizona.

The American approach is radically different from that used by most other countries. Rather than use a bottom-up, decentralized approach to admit immigrants, many nations employ a top-down approach in which the government determines the number and type of people who will be admitted each year either as temporary workers or permanent migrants. In Canada, for example, the government uses a merit-based points system, which assigns higher points to migrants with strong credentials, useful experience, language ability, and related characteristics.<sup>10</sup> Approaches like Canada's are superficially quite appealing: They seem to rationalize the screening process and provide a straightforward metric for distinguishing between the types of migrants a state values and those it does not. Their appeal even led US lawmakers during the last attempt at comprehensive immigration reform to propose amendments that would have

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<sup>7</sup> 132 S Ct 2492 (2012).

<sup>8</sup> *Id.* at 2497–98.

<sup>9</sup> See, for example, James Doty, *Arizona's New Immigration Law is Unconstitutional* (Salon Apr 26, 2010), online at [http://www.salon.com/2010/04/26/is\\_arizona\\_immigration\\_law\\_unconstitutional](http://www.salon.com/2010/04/26/is_arizona_immigration_law_unconstitutional) (visited Nov 25, 2012). See also Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 *Hastings L J* 1673, 1675–79 (2011).

<sup>10</sup> See Citizenship and Immigration Canada (CIC), *Other Selection Factors—Skilled Workers and Professionals* (June 26, 2010), online at <http://www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp> (visited Nov 25, 2012) (explaining the criteria for assigning points, of which an immigrant must get 67 out of 100 in order to qualify for immigration). See also Part II.E.1 (discussing points systems for labor migration).

scrapped much of the United States's existing system and replaced it with a more top-down approach like Canada's.<sup>11</sup>

Despite the seeming rationality of such an approach, this Article argues that delegating to agents (partial) authority to admit foreign migrants enables the government to exploit the informational advantages of those agents. As principal-agent theory suggests, individuals and institutions can obtain significant gains by delegating authority to agents in a range of circumstances. In the case of the immigration system, the US government can obtain better migration outcomes—admitting more socially valuable migrants while excluding less socially valuable migrants—by delegating decision making to agents. Employers can often do a far superior job of evaluating the productivity of foreign workers. Family members are generally in a better position than the government to evaluate the capability of potential migrants to integrate after arrival. And states have more information about local immigration conditions—and vastly more information about where individual immigrants are located—than does the federal government.

But delegation comes with costs: agents can ignore the principal's interests and pursue their own agendas, or they can simply shirk. As principal-agent theory shows, principals can construct contracts or rules that provide agents with better incentives. We argue that American immigration law supplies some such rules. The delegation to private agents and to state and local governments is partial. In many cases, the restrictions imposed on the agents' decision-making powers can be seen as efforts to align the agents' incentives with those of the federal government, or at least to blunt shirking when those interests inevitably come into conflict. Employers cannot admit workers who will inflict certain negative impacts on the US labor market. Family members are by definition limited to picking from a very small pool of prospective migrants—except in the case of marriage, where complex rules discourage the agents from selling their spousal sponsorship to the highest bidder. And state and local governmental actors face a monitoring scheme designed to curb both under- and overzealous screening behavior by those actors.

Principal-agent models can therefore help us better understand and evaluate the structure of American immigration law. In what follows,

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<sup>11</sup> Compare SA 1358 to S 1348, 110th Cong, 1st Sess, in 153 Cong Rec S 7204–05 (daily ed June 6, 2007) (proposing a points system based on factors such as occupation, arranged employment, age, and English language ability), with CIC, *Coming to Canada as a Business Immigrant* (Dec 7, 2010), online at <http://cic.gc.ca/english/resources/publications/busimm.asp> (visited Nov 25, 2012).

we show how the theory provides an important defense of some oft-criticized features of the US system. However, we do not argue that the US system is the best possible. We identify a number of features that are perverse from a principal-agent perspective, suggesting grounds on which those features should be reformed. Moreover, the introduction of a new way of thinking about immigration delegation raises larger questions that are beyond this Article's scope of inquiry—such as questions about what other potential agents an institutional designer might employ were she structuring the immigration system from scratch.

This Article builds on two earlier articles we have written about the second-order structure of immigration law—the legal rules that are designed to promote certain first-order migration goals.<sup>12</sup> While we are interested principally in these second-order questions, as in our earlier work we must make some assumptions about first-order goals in order to motivate the analysis. Throughout the Article we draw these assumptions about first-order goals from the structure of immigration law itself; they include broad assumptions that the government would like to control the flow of both the numbers and types of immigrants, as well as more specific assumptions—for example, that the government would like to increase the pool of human capital available to US employers, or perhaps even promote a certain racial, ethnic, or cultural mix among immigrants. As in our earlier work, our central interest is not the defensibility of the particular goals we discuss. It is, instead, the relationship between these goals and the use of delegation as a second-order design strategy in immigration law.

Part I of this Article sets out the theoretical framework. Parts II, III, and IV apply the framework to employers, families, and the states.

## I. PRINCIPALS, AGENTS, AND DELEGATION

Delegation refers to the transfer of authority from one party to another with the expectation that the delegate (or “agent”) will use that authority to achieve the goals of the other party (the “principal”). Such agency relationships are ubiquitous. Employers delegate power to employees; governments delegate power to agencies; firms delegate power to outside contractors. The essence of the agency relationship is

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<sup>12</sup> See Adam B. Cox and Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 NYU L Rev 1403, 1409 (2009); Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan L Rev 809, 811–12 (2007).

the superior information of the agent: the principal delegates to the agent in order to take advantage of the agent's expertise, but because the agent has better information than the principal, the principal will have difficulty monitoring the agent and ensuring that the agent acts in the principal's interest. Economists and political scientists use principal-agent models to analyze these relationships.<sup>13</sup>

In a principal-agent model, the principal hires an agent to perform a task that benefits the principal. The agent's preferences and the principal's preferences are not the same. In some models, the agent chooses between a high level of effort and a low level of effort ("shirking"). The agent prefers to engage in the low level of effort because it is less work, but the principal gains more from the high level of effort. In order to encourage the agent to engage in the high level of effort, the principal must give the agent incentives. In other models, the principal and agent have different goals. Shirking now means that the agent pursues her own goals rather than the goals of the principal; again, the principal must give the agent incentives to encourage her to achieve the principal's goals. In both models, the principal cannot directly observe what the agent does and give her a reward for engaging in a high level of effort and punish her for engaging in a low level of effort. If the principal could do this, the problem would be easily solved. The principal would simply reward the agent for a high level of effort and punish the agent for a low level of effort, and the agent would respond by engaging in the high level of effort.

Because the principal cannot directly observe what the agent does, the principal can reward or punish her only on the basis of the observed outcome of her action. But effort and outcome are not perfectly related: This is what makes it difficult for the principal to monitor the agent directly. A high level of effort will thus sometimes lead to a bad outcome for the principal, and a low level of effort will sometimes lead to a good outcome for the principal. A principal can give an agent optimal incentives by rewarding her if the optimal outcome occurs and punishing her if the bad outcome occurs. To maximize her expected payoff, the agent will use the high level of effort even though there is a chance that the bad outcome will nonetheless occur, and she will be punished. But many people would turn down such a scheme. Even if the chance of being rewarded for low effort (an unfair reward) is equal to the chance to being punished for high effort (an unfair punishment), a risk-averse agent will be reluctant to

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<sup>13</sup> See, for example, Jean-Jacques Laffont and David Martimort, *The Theory of Incentives: The Principal-Agent Model* 27-30 (Princeton 2001).



enter into such an agency relationship. In such situations, the principal will have to moderate the reward and punishment to entice the prospective agent to accept the delegation—in effect, insuring the agent against the bad outcome. This insurance blunts the agent's incentives, leading a rational agent to invest less effort in the task.

Many areas of immigration law raise information problems that are frequently addressed through delegation. As we have written elsewhere, migration policy in large, receiving nations like the United States presents a screening problem.<sup>14</sup> The state would like to control the types of migrants who are admitted—where a migrant's type refers to characteristics of the migrant that make her desirable to the state, however those characteristics or a migrant's desirability might be defined. For example, states often seek migrants who are highly skilled. These migrants will make money, contribute skills to citizens they interact with, start businesses, and help finance public goods through their taxes. Nations also often seek migrants who possess or are likely to invest in country-specific human capital—that is, skills that are valuable only within the receiving country.<sup>15</sup> These migrants include those who speak the dominant language (or can quickly learn it), have personal connections with existing residents, share the dominant culture's values, and understand (or can quickly learn) the prevailing social norms.<sup>16</sup> For many states, such migrants—those who have skills that are in high demand, or possess country-specific human capital, or (ideally) both—are considered “good types.” The problem is that a migrant's type is hidden information; the migrant knows her type but the government does not. The government thus faces what economists call a hidden information (or screening) problem.<sup>17</sup>

The information problems for the state do not disappear once the migrants are selected. The state also cares about what the migrants do once they arrive. For example, states often want new migrants to work and make country-specific investments. But not all migrants will act in this way. States will thus worry that migrants will arrive and shirk by underinvesting in their country-specific human capital, by failing to integrate, or worse, by entering the social-welfare system or turning to crime.<sup>18</sup> Even good types might display

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<sup>14</sup> See Cox and Posner, 59 *Stan L Rev* at 824–27 (cited in note 12).

<sup>15</sup> For the definition of country-specific human capital, see *id.* at 828.

<sup>16</sup> See *id.*

<sup>17</sup> See Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 *SC L Rev* 203, 210 n 43 (2008).

<sup>18</sup> See generally Gordon H. Hanson, *The Governance of Migration Policy*, 11 *J Human Dev & Capabilities* 185 (2010) (examining the fiscal incentives of high-income countries with regard to immigration policy and discussing how fiscal policy drives immigration policy in such

such bad behavior, though they are less likely to do so than bad types. The problem for the government is that migrants who engage in bad behavior may be difficult to detect, punish, and (if necessary) remove. The government thus faces what economists call a hidden action (or moral hazard) problem.<sup>19</sup>

A state can address these two problems—hidden information and hidden action—without delegating authority to those outside the national government. Ex ante, the government can try to screen out bad types by demanding proof of work and language skills, or requiring migrants to take exams before they are admitted.<sup>20</sup> Ex post, the government can screen out bad types by relying on information acquired after the migrant arrives—information about their success in the labor force, their criminal record, and so forth.<sup>21</sup> It can also try to control migrant behavior by employing both carrots and sticks—granting rights to migrants to provide security and encourage investments and integration, for example, or threatening to deport anyone who cannot keep a job.<sup>22</sup>

Most states, including the United States, employ these approaches.<sup>23</sup> But they can be supplemented with delegation to agents outside the national government. Private parties will often have superior information about how productive a migrant might be, about how likely it is that she will put down roots in the receiving state, and so on—about all of the attributes that the state might consider important to identifying the good types from within the huge pool of potential migrants. Employers, families, universities, religious organizations, and others might all fit this bill. In some cases smaller units of government—like US states or local governments—will also have better information. Moreover, these various potential agents will also often be

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nations). See also Michael S. Teitelbaum and Myron Weiner, *Introduction: Threatened People, Threatened Borders: Migration and U.S. Foreign Policy*, in Michael S. Teitelbaum and Myron Weiner, eds, *Threatened People, Threatened Borders: World Migration and U.S. Policy* 13, 17–18 (Norton 1995).

<sup>19</sup> See Laffont and Martimort, *Theory of Incentives* at 145–48 (cited in note 13).

<sup>20</sup> See, for example, CIC, *Points for Proficiency in English or French—Skilled Workers and Professionals* (Nov 9, 2011), online at <http://www.cic.gc.ca/english/immigrate/skilled/factor-language.asp> (visited Nov 25, 2012) (describing Canada's method for calculating points for English- and French-language skills).

<sup>21</sup> For an extensive discussion of the choice states face between ex ante and ex post screening, see Cox and Posner, 59 *Stan L Rev* at 824–27, 835–43 (cited in note 12).

<sup>22</sup> For a discussion of how states can use rights to encourage investment by migrants, see Cox and Posner, 84 *NYU L Rev* at 828–29 (cited in note 12).

<sup>23</sup> See, for example, 8 USC §§ 1182, 1227 (specifying conditions under which aliens can be deported either for committing certain crimes or for violating the terms under which they were admitted).

in a better position than the federal government to monitor the migrants and control their behavior after they arrive.

This possibility is often overlooked in discussions of immigration law. Part of the reason, as we noted above, is that American immigration law is not generally thought to involve much, if any, delegation of power. Instead, the federal government is typically described as jealously guarding its plenary power over immigration. The structure of the federal immigration code contributes to this way of thinking. The INA runs hundreds of pages, leaving the impression that Congress has laid out, intricately and comprehensively, the rules that govern the screening and conduct of immigrants.

To be sure, the possibility of delegation has not gone entirely unnoticed in recent years. One of us has written elsewhere about the structure of delegation *within* the national government.<sup>24</sup> Moreover, the surge in scholarship focusing on second-order issues in immigration law has led other scholars to identify particular, isolated instances where immigration enforcement authority has been delegated to private parties.<sup>25</sup> But these articles generally conceptualize private delegation as unusual and as focused almost exclusively on questions of enforcement—that is, the identification of immigration violators. As we will show, delegation is not unusual or limited to the periphery of immigration law; delegation is thoroughgoing and affects the vast majority of immigration decisions. Moreover, delegation does not exclusively, or even principally, concern enforcement. The national government has given over to private parties authority to shape core selection decisions in immigration law—to decide what types of people should have lawful immigrant status in the United States, not just to identify those who have violated their status.

Our aim in the following Parts is twofold. The first is descriptive: we explain how three different groups of agents—employers, family

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<sup>24</sup> See Cox and Rodríguez, 119 Yale L J at 458 (cited in note 6).

<sup>25</sup> See, for example, Eleanor Marie Lawrence Brown, *A Visa to "Snitch": An Addendum to Cox and Posner*, 87 Notre Dame L Rev 973, 979–82 (2012) (proposing a system that would require highly educated “elites” to inform the government of friends and family members who harbor hatred of the US government as a condition of retaining their visas); Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 Fordham L Rev 2475, 2491–94 (2009) (arguing that guest worker programs should partially outsource screening to source-labor countries, which would generate informal enforcement systems if a country’s future visa quota were tied to compliance rates); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 Stan L Rev 1103, 1105–07 (2009) (asserting that, by rarely punishing the employers of illegal aliens but following through on employers’ whistleblowing when an illegally employed alien becomes undesirable, the government has effectively turned work authorization over to private employers); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 Georgetown L J 777, 778–80 (2008) (cataloging the proliferation of laws that require private enforcement by actors such as transportation companies, employers, and landlords).

members, and subfederal units of government—have been given significant control over who gets to come to the United States and over who is forced to leave, and we explore the scope and limitations of the delegation to each group of agents. The second goal is theoretical: we provide a framework for analyzing the tradeoffs that the government faces when it is deciding whether, and to what extent, to delegate immigration authority. Principal-agent theory highlights the balancing act the national government faces with respect to each type of agent. The government can take advantage of the superior information of the agent by giving the agent some power to select migrants and control their behavior. But because the interests of agents always diverge, a little or a lot, from the interests of the national government, there are serious costs to giving too much power to the agents. To show how states can combat these costs, we draw on an extensive economics literature about designing institutions to mitigate agency costs.

Consistent with our previous work, this theoretical framework focuses on second-order design issues rather than first-order policy goals. It also continues to explore the ways in which the information problems posed by immigration law are central to the design of immigration institutions. Before proceeding, we should emphasize that the arguments in the following Parts about the structure of delegation within immigration law are not causal claims. The theoretical framework we provide can help explain and justify certain patterns of delegation, but we do not mean to suggest that the theory necessarily explains *why* the United States has structured immigration delegation as it has. In some cases—such as with respect to the spousal-visa requirements—the evolution of legal rules suggests that the government was in fact focused, at least implicitly, on principal-agent issues. In other areas, of course, the evolution of immigration law is more likely the product of interest-group politics or simple historical happenstance. Irrespective of the origins of delegation in immigration law, however, understanding delegation's theoretical underpinnings is crucial to evaluating the current structure and future design of American immigration law.

## II. EMPLOYERS

### A. Labor Immigration Rules

American immigration law contains two tracks for labor migration. The first is for noncitizens who intend to settle permanently in

the United States—people whom the INA defines as “immigrants.”<sup>26</sup> The second track is for putatively temporary workers, who are defined by the INA as “nonimmigrants.”<sup>27</sup> The INA sets aside 140,000 slots per year for the first group and allocates slots according to a system of five preferences.<sup>28</sup> The first preference is for “[p]riority workers” consisting of persons of “extraordinary ability,” internationally recognized professors and researchers, and executives of corporations with affiliates in the United States.<sup>29</sup> The second preference is for professionals with advanced degrees and exceptionally talented people in the arts, sciences, and business.<sup>30</sup> The third preference is for skilled workers in short supply and professionals holding baccalaureate degrees.<sup>31</sup> These three preferences receive most of the immigration slots, with the fourth and fifth preferences being allocated a smaller number of visas for religious workers, former employees of the US government and international organizations, and investors who will invest at least \$1 million in the US economy and create at least ten jobs for Americans.<sup>32</sup>

Noncitizens seeking admission under the first three categories must usually be sponsored by an employer. Some persons of extraordinary ability are excused from this requirement, as are certain others—for example, physicians who agree to work for at least five years in a part of the country where there is a shortage of health care professionals.<sup>33</sup> For those people who are not excused, the employer must submit a petition for labor certification.<sup>34</sup> To obtain a labor certification, the employer must prove that “there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa . . . and at the place where the alien is to perform such skilled or unskilled labor,” and that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>35</sup> To prove that these conditions are

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<sup>26</sup> 8 USC § 1101(a)(15).

<sup>27</sup> 8 USC § 1101(a)(15).

<sup>28</sup> 8 USC §§ 1151(d)(1), 1153(b). For a general overview of the labor immigration rules, which are often difficult to deduce from the INA itself, see David Weissbrodt and Laura Danielson, *Immigration Law and Procedure in a Nutshell* 154–72 (West 6th ed 2010); Thomas Alexander Aleinikoff, et al, *Immigration and Citizenship: Process and Policy* 161–66 (West 6th ed 2008).

<sup>29</sup> 8 USC § 1153(b)(1).

<sup>30</sup> 8 USC § 1153(b)(2).

<sup>31</sup> 8 USC § 1153(b)(3).

<sup>32</sup> 8 USC § 1153(b)(4)–(5). See also Weissbrodt and Danielson, *Immigration Law and Procedure* at 154–58 (cited in note 28).

<sup>33</sup> 8 USC § 1153(b)(2)(B)(ii).

<sup>34</sup> 8 USC § 1182(n).

<sup>35</sup> 8 USC § 1182(a)(5)(A)(i).

satisfied, the employer must advertise the exact position—with the same duties and compensation—and show that no US worker applied for the job or that those who did apply were unqualified.<sup>36</sup>

If the application for an immigrant worker is approved, she may settle in the United States. Importantly, the immigrant is not required to stay in the position offered by the sponsoring employer. She is admitted as a lawful permanent resident (LPR), a visa status that does not limit the duration of her stay and does not require her to work at all—let alone for her sponsoring employer—in order to maintain her visa status.<sup>37</sup>

Temporary or nonimmigrant workers are those who do not intend to settle in the United States but plan to return to their country of origin. These workers are often admitted on H visas, of which approximately 420,000 were issued in 2009.<sup>38</sup> We will focus on two types of visas: the H-1B visa for workers in “specialty occupations,” which are those which require “a body of highly specialized knowledge”;<sup>39</sup> and the H-2A visa for workers who will perform temporary or seasonal work, normally in agriculture.<sup>40</sup>

The government issues H-1B visas up to a cap of 65,000, though the number can—and typically does—exceed that amount because of various loopholes.<sup>41</sup> These visas are reserved for employees in “specialty occupations.”<sup>42</sup> In order to obtain an H-1B visa, a worker must be

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<sup>36</sup> 8 USC § 1182(n)(1).

<sup>37</sup> 8 USC § 1101(a)(13)(C).

<sup>38</sup> See US Citizenship and Immigration Services, *Annual Report on Characteristics of Specialty Occupational Workers (H-1B) for Fiscal Year 2009* ii (Department of Homeland Security Apr 15, 2010), online at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf> (visited Nov 25, 2012) (providing data on H-1B visas); Randall Monger and Macreadie Barr, Office of Immigration Statistics, *Nonimmigrant Admissions to the United States: 2009* 4 (Department of Homeland Security Apr 2010), online at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ni\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2009.pdf) (visited Nov 25, 2012) (providing data on H-2 visas and the breakdown by type of visa). We should note that federal estimates of the size of the H visa programs vary. Department of Homeland Security (DHS) issued two reports for Fiscal Year 2009 that reached different estimates for the total number of H-1B visas granted, and its estimate for H-2A visas granted (approximately 206,000) differs from the estimates by the Department of State (approximately 100,000) and the Department of Labor (approximately 250,000). For a collection of these varying figures, see Global Workers Justice Alliance, *Statistics for H2A, H2B, and H2R Visas for 2006–2009* \*1 (June 2010), online at [http://www.docstoc.com/docs/93294124/Statistics-for-H2A\\_-H2B\\_-and-H2R-Visas-Overview](http://www.docstoc.com/docs/93294124/Statistics-for-H2A_-H2B_-and-H2R-Visas-Overview) (visited Nov 25, 2012).

<sup>39</sup> 8 USC § 1184(i)(1). See also Weissbrodt and Danielson, *Immigration Law and Procedure* at 200–07 (cited in note 28).

<sup>40</sup> See 8 USC § 1188. See also Weissbrodt and Danielson, *Immigration Law and Procedure* at 200–07 (cited in note 28).

<sup>41</sup> See Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupational Workers* at 3 (cited in note 38).

<sup>42</sup> 8 USC § 1184(i). See also note 69.

sponsored by an employer.<sup>43</sup> Employers are required to file a labor condition application, which states that the worker will be paid at least as much as existing employees in the same occupation, that the position will not harm similarly situated US workers and that the employer is not involved in a labor dispute.<sup>44</sup> H-1B status lasts for three years and may be extended to six years.<sup>45</sup> If a person with H-1B status wants to continue working in the United States after the end of six years,<sup>46</sup> she must leave the country for one year and then reapply for the visa. However, an H-1B visa holder may apply for permanent immigration and will enjoy certain procedural benefits compared to other applicants residing inside or outside the United States.<sup>47</sup>

A temporary worker with H-1B status faces serious restrictions on job mobility: the baseline rule is that her visa is valid only as long as she remains employed with the employer who sponsored her.<sup>48</sup> Unlike an immigrant worker, therefore, she cannot quit and change jobs whenever she wants. However, there is some limited visa “portability.” A nonimmigrant worker with H-1B status may apply for a job with an employer who is willing to sponsor her for a new H-1B visa, and may take that position as soon as the employer files a petition.<sup>49</sup>

Agricultural employers who need seasonal labor may take advantage of the H-2A program.<sup>50</sup> These workers are admitted for a limited period of less than one year.<sup>51</sup> The workers do not need any special qualifications—they may be unskilled—but the employer must show that “there are not sufficient [US] workers who are able, willing, and qualified, and who will be available at the time and place needed”<sup>52</sup> and that the employment of H-2A workers “will not adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>53</sup> H-2A workers must be paid the prevailing wage that

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<sup>43</sup> 8 USC § 1184(c).

<sup>44</sup> 8 USC § 1182(n)(1).

<sup>45</sup> 8 CFR § 214.2(h).

<sup>46</sup> 8 USC § 1184(g)(4).

<sup>47</sup> See American Competitiveness in the Twenty-First Century Act of 2000 (“American Competitiveness Act”), Pub L 106-313, 114 Stat 1251.

<sup>48</sup> 8 USC § 1184(n)(1) (providing that, if an H-1B holder leaves the employer that sponsored his H-1B and the petition of his next prospective employer is denied, his authorization status ceases).

<sup>49</sup> 8 USC § 1184(n)(1).

<sup>50</sup> 8 USC § 1188.

<sup>51</sup> 20 CFR § 655.103. See also Department of Labor, *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)* (Sept 2009), online at <http://www.dol.gov/compliance/guide/taw.htm> (visited Nov 25, 2012).

<sup>52</sup> 8 USC § 1188(a)(1)(A).

<sup>53</sup> 8 USC § 1188(a)(1)(B).

would be paid to US workers.<sup>54</sup> Like H-1B visa holders, H-2A migrants lack job mobility. But their visas are even more restrictive: during the term of their visas, H-2A holders are prohibited from seeking new jobs with different sponsoring employers.<sup>55</sup>

The central feature of this system is the partial or constrained delegation of authority to employers to select permanent immigrant workers and temporary nonimmigrant workers. Employers are given primary authority to select workers from the vast pool of noncitizens who seek work in the United States, but they must meet several criteria—including the requirements that the worker have significant qualifications and not compete with US workers. Another feature of the system that is of interest is that of portability: immigrant workers have portability while nonimmigrant workers for the most part lack portability.

## B. The First-Order Goals of Employment-Migration Policy

To understand why the government might delegate screening authority to employers, we first need some sense of why the government would want to admit any labor migrants. The first-order goals of labor migration are likely quite complex, but it is reasonable to assume that the government seeks labor migrants who are productive and have preferences for public goods that are close to those of the median citizen. It is also reasonable to assume that the government wants to avoid migration that reduces the wages of Americans and causes job loss. But how can the government both seek additional workers—who by augmenting supply necessarily depress wages—and avoid migration that reduces wages?<sup>56</sup>

One possibility is that migrants enter industries for which there are literally no qualified American workers who will work for any wage. But there are probably few industries for which this is true—translation of materials from or into obscure languages may be an example. It is sometimes said that US citizens will not work as gardeners or nannies or nurses, but that statement is clearly false; the problem is that US citizens will not work in sufficient numbers at the prevailing wage rather than at some higher wage. More plausibly, we

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<sup>54</sup> 8 USC § 1188(c)(3)(B)(i). See also 20 CFR § 655.10 (describing the process to determine prevailing wages for temporary labor certification purposes).

<sup>55</sup> Consider 8 USC §§ 1101(a)(15)(H)(ii)(a), 1184(i)(1), 1184(n) (authorizing only H-1B holders to find new employment).

<sup>56</sup> To be sure, there are theoretical conditions where this is possible. One possibility is that migrants are perfect complements (rather than substitutes) for domestic workers. Another possibility is that migrants will augment the demand for domestically produced goods, leading to higher wages for US workers, although not necessarily those in the same industry as the migrant.



might imagine that some domestic industries are periodically hit by shocks that greatly augment the demand for their products and hence the demand for labor. The classic example was the dot-com boom, which resulted from the development of the Internet.<sup>57</sup> As firms competed for software engineers, the wages of American software engineers skyrocketed.<sup>58</sup> The migration of vast numbers of foreign software engineers, mainly from South Asia, would, of course, suppress domestic wages relative to what they would have been in the absence of the migration—but those wages would have risen more slowly rather than declined—and migration would not have caused unemployment.<sup>59</sup> For that reason, resistance among US workers to the migration would likely have been minimal. At the same time, employers, consumer groups, and businesses that use computer products would have a strong interest in lower prices (or higher profits, in the case of employers) and for that reason would support the migration.<sup>60</sup> Thus, permitting short-term migration following exogenous shocks that increase the demand for labor is perhaps the easiest case from the government's perspective.

There are several problems with this theory as an explanation of American labor-migration policy. First, the quotas for temporary employment visas are in practice quite sticky. While the quotas are occasionally changed by Congress—the dot-com boom being one example—for the most part they remain unchanged year after year, even while labor market conditions are fluctuating significantly.<sup>61</sup> Second,

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<sup>57</sup> See John Schwartz, *Dot-Com is Dot-Gone, and the Dream with It*, NY Times section 9 at 1 (Nov 25, 2001) (discussing the dot-com boom and its subsequent bust).

<sup>58</sup> See Chris Murphy, *Global CIO: Modest Salaries Offer Tech Bubble Reality Check*, InformationWeek (May 20, 2011), online at <http://www.informationweek.com/news/global-cio/interviews/229600667> (visited Nov 25, 2012).

<sup>59</sup> See Norman Matloff, *High-Tech Cheap Labor*, Wash Post A35 (Sept 12, 2000) (discussing lobbying by computer industry CEOs to raise the quota for H-1B work visas in response to increased demand for high-tech laborers during the dot-com boom); John P. De New and Klaus F. Zimmermann, *Native Wage Impacts of Foreign Labor: A Random Effects Panel Analysis*, 7 J Population Econ 177, 191 (1994) (examining the labor market impacts of foreign workers on native worker salary and unemployment figures).

<sup>60</sup> See Norman Matloff, *High-Tech Trojan Horse: H-1B Visas and the Computer Industry* (Center for Immigration Studies Sept 1999), online at <http://www.cis.org/ComputerIndustryVisas-h1b> (visited Nov 25, 2012) (discussing the tech industry's lobbying efforts to raise the H-1B quota and the resulting legislation); New Workers for Economic Growth Act, S 1440, 106th Cong, 1st Sess (1999) (proposing legislation to increase the H-1B visa quota); Bringing Resources from Academia to the Industry of Our Nation Act, HR 2687, 106th Cong, 1st Sess (1999) (proposing legislation to extend the duration of H-1B visas).

<sup>61</sup> See American Competitiveness Act § 102, 114 Stat at 1251–52 (raising the H-1B limit to 195,000 for FY 2001 to 2003). For annual reports on H-1B quotas and petitions, see US Citizenship and Immigration Services, *Reports and Studies*, online at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=9a1d9ddf801b3210VgnVC>

the same industries tend to receive most of the H-1B and H-2A workers year after year.<sup>62</sup> This makes it look like the programs are more the product of interest-group politics and inertia. Third, a theory grounded in labor-market shocks cannot account for the large-scale system of permanent labor migration. Permanent migration appears instead to reflect a goal of improving the aggregate stock of human capital.

As this thumbnail sketch suggests, the wage and employment effects of labor migration are extremely complicated and contested. Nonetheless, the INA appears to reflect the twin goals of (1) increasing the labor supply in response to labor shortages (that in theory are most likely to arise in response to exogenous shocks to the labor market) and (2) upgrading the stock of human capital available to domestic employers even in the absence of any shortage of workers. In what follows, we explore what structure of delegation can best advance these first-order goals.

### C. The Advantages of Delegation to Employers

Employers will generally have better information than the government about the quality (in particular, the productivity) of potential applicants. Employers can better evaluate credentials, such as diplomas, and the quality of the match between the applicant's talents and the employer's needs. In addition, the employer will have better information about the local labor market—that is, the availability of US workers who could perform the same job. It is possible, although less certain, that employers will be in a better position than the government to evaluate the applicant's preferences about public goods, which may be revealed through interviews and other parts of the application process.

Employers do not always have informational advantages. In general, the advantages will be greater if the government is interested in using labor migration to ameliorate transitory labor shortages within particular job sectors or where the government has independent reasons to want to structure labor migration as a matching of prospective immigrant employees to specific employers. Where the government is interested instead in using labor migration to augment the supply of human capital within the state, the informational advantages of the employers are somewhat weaker. This is because the

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M100000b92ca60aRCRD&vgnnextchannel=9a1d9ddf801b3210VgnVCM100000b92ca60aRCRD (visited Nov 25, 2012).

<sup>62</sup> See John Miano, *H-1B Visa Numbers: No Relationship to Economic Need* (Center for Immigration Studies June 2008), online at <http://www.cis.org/H1bVisaNumbers> (visited Nov 25, 2012) (examining the consistency of the breakdown of H-1B visas allocated by industry).

firm-specific job requirements about which the employer has clearly superior information are less relevant if the goal is to pick migrants who have skills or training that will, over the long run, benefit the state.

Employers may also have fewer informational advantages when the government seeks to expand the pool of what is generally referred to as unskilled labor. In the immigration code and the economic literature, unskilled workers are typically those without specialized training or educational credentials. Sometimes these workers are admitted for jobs that require skill even though they involve no specialized training or educational prerequisites—jobs where some workers will be vastly more productive than others. Cane cutters admitted to Florida as part of the H-2A program are often said to constitute such workers.<sup>63</sup> But in other cases unskilled workers are admitted to perform jobs that require little skill of any sort and for which the productivity differences among employees are negligible. In such cases the employers have little to contribute to the screening process because there are few skills differences among workers for the employer to detect.

A government that wants to capitalize on the informational advantages of employers is therefore likely to delegate to employers more—or will delegate in a less constrained fashion—for temporary migrants than for permanent migrants and for skilled migrants than for unskilled migrants.

#### D. The Disadvantages of Delegation

Employers do not necessarily or even usually share all the interests of the government. As we have explained above, the government likely seeks labor immigrants (or nonimmigrants) who will advance productivity, share the policy preferences of the majority, and be able to live and prosper in the United States.<sup>64</sup> Employers seek workers who advance productivity alone. In addition, the government may have reasons to favor certain industries or groups of workers; employers as a group obviously do not and could not share these interests.

To see the problem, consider a system where the government determined the number of migrants to be admitted in a given year—say, 100,000—and then distributed slots at random to employers or sold them by auction. Employers would then choose to fill the slots however they wanted to. Employers would choose migrants with the

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<sup>63</sup> See Glyn James, *Sugarcane* 165 (Blackwell 2d ed 2004).

<sup>64</sup> See Part II.B.

highest level of productivity for positions that need to be filled. But in most cases employers would not consider the migrants' policy preferences—for example, whether they share American civic ideals or instead harbor authoritarian and intolerant political preferences. Employers will also not take account of the various costs that workers may impose on society if they quit or are fired. In the case of permanent migrants, these costs may be considerable because unemployed workers will often qualify for at least some public assistance.<sup>65</sup> And even in the case of temporary migrant workers, these costs will often be high because workers may overstay their visas. A specialized translator of technical manuals into Urdu may not be able to find another job if he is fired and may instead become a public charge.

Employers could shirk in other ways. Employers will invest resources into screening where the marginal costs equal the marginal benefits for the employer, not for society. An intensive screening procedure will not be cost-effective for the employer if it can identify highly productive people with adequate probability simply on the basis of their diplomas. The employer may expect to employ the worker for, say, five years on average, in which case the downside from misjudging the productivity of the worker will be limited to a lost opportunity for five years. But if the worker can stay beyond five years, then an intensive screening process will benefit future employers (who, in the case of low-productivity workers, will be spared the cost of screening if the first employer had screened them out). However, the first employer has no incentive to take these benefits into account.

Finally, when the worker arrives, the employer will have strong incentives to encourage the worker to invest in firm-specific human capital, not country-specific human capital. At the end of the three or five years, the worker may therefore be highly productive at the workplace for which she was sponsored but not at any other workplace in the country. And the employer has no incentive to teach her skills that will make her a productive citizen. For this reason, an employer-based

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<sup>65</sup> LPRs are prohibited from receiving some federal benefits until they have resided in the United States for five years. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 403, Pub L No 104-193, 110 Stat 2105, 2265–67, codified at 8 USC § 1613. But other federal benefits are available immediately, and state governments often extend the social safety net to LPRs prior to their eligibility for federal benefits. See Aleinikoff, et al, *Immigration and Citizenship* at 1228–32 (cited in note 28) (listing initial exceptions to the five-year bar and describing subsequent statutes that relaxed the bar in additional situations); id at 1246–47 (“[M]ore than half of the states provide benefits to at least some noncitizens who are ineligible for federal services.”).

sponsorship system is more suitable for temporary migration than for permanent migration.

These considerations suggest a rough prediction about the appropriate degree of delegation for different types of foreign workers. Because permanent workers produce benefits and costs for the state well beyond their period of employment with the sponsoring employer, delegation should be greater for temporary workers than for permanent migrants. This point reinforces our earlier argument that because employers' informational advantages over the government will be greater for temporary migrants than for permanent migrants, delegation should be greater for temporary migrants.<sup>66</sup>

#### E. The Structure of Employment Delegation

From society's standpoint, the optimal immigration law will take advantage of the employer's superior information while preventing the employer from shirking. But how can the government capitalize on the employer's superior capacity for screening migrants and simultaneously prevent the employer from choosing migrants who serve the employer's private interest but harm the public's interest? The above discussion suggests a few design principles—such as delegating greater authority over temporary rather than permanent labor visas. More generally, we can see that immigration law will sometimes need to give the employer an incentive to screen migrants well by offering a reward, while at the same time constrain the reward or impose sanctions in order to deter the employer from choosing privately beneficial but socially harmful workers. The following discussion considers how immigration rules might be designed to accomplish those goals.

##### 1. Nondelegation: Merit-based point systems.

To begin, let us consider a baseline system without delegation. A number of countries use a merit-based point system to screen (permanent) migrants,<sup>67</sup> and such an approach has been proposed for

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<sup>66</sup> See Part II.C.

<sup>67</sup> Examples include Canada, New Zealand, and Australia. See CIC, *Six Selection Factors* (cited in note 10); Immigration New Zealand, *The Skilled Migrant Category Points Indicator* (Aug 12, 2011), online at <http://www.immigration.govt.nz/pointsindicator> (visited Nov 25, 2012); Department of Immigration and Citizenship, *Professionals and Other Skilled Migrants: What Is the Points Test?*, online at <http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm> (visited Nov 25, 2012). For an overview of point systems, see Demetrios G. Papademetriou and Madeleine Sumption, *Rethinking Points Systems and Employer-Selected Immigration* 1–8 (Migration Policy Institute June 2011), online at <http://www.migrationpolicy.org/pubs/rethinkingpointssystem.pdf> (visited Nov 25, 2012).

the United States as well. Under a 2007 bill, applicants would be assigned points according to various criteria that emphasize domestic labor demand, skills, education, and compatibility.<sup>68</sup> For example, an applicant who could be employed in a “specialty occupation”<sup>69</sup> would receive twenty points, an applicant who could be employed in a high-demand occupation would receive sixteen points, and an applicant who could be employed in the sciences and related fields would receive eight points.<sup>70</sup> Applicants also would receive points for US work experience, English-speaking ability, relatives in the United States, success on a US civics exam, and advanced educational attainment—for example, twenty points for an advanced graduate degree and five points for a certified vocational degree.<sup>71</sup>

Point systems are attractive because they enable a country to choose people directly on the basis of criteria that matter from a social standpoint. As we saw, employers may seek highly productive workers but they do not take account of the costs and benefits of workers for society outside the workplace (including after they quit and take a new job).<sup>72</sup> Importers of unskilled agricultural labor, for example, may not care that the workers cannot speak English; but these workers may have trouble integrating themselves into American society without English-language skills. Under a point system, the government makes the trade-off between productivity and assimilability directly and embodies the trade-off in an algorithm that better serves the public interest.

However, we are skeptical of the utility of point systems. In a market economy, the highest-valued workers are not necessarily those with the highest educational attainments. The highest-value workers are those in industries where demand greatly exceeds the supply of workers. When demand spikes (or supply declines), wages will rise as well, and that will encourage US workers to move into the industry. So, even when labor shortages open up, they can close quickly. The government can try to determine where the shortages are located by conducting surveys and engaging in statistical analysis, but it cannot

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<sup>68</sup> S 1639, 110th Cong, 1st Sess (2007) (proposing legislation to provide for comprehensive immigration reform). See also Aleinikoff, et al, *Immigration and Citizenship* at 460–62 (cited in note 28).

<sup>69</sup> The INA defines a “specialty occupation” as an occupation that requires “theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 USC § 1184(i)(1).

<sup>70</sup> See Aleinikoff, et al, *Immigration and Citizenship* at 461–62 (cited in note 28).

<sup>71</sup> *Id.*

<sup>72</sup> See Part II.D.

foresee the future as well as employers with experience in the field and will at best be able to aggregate information in a crude fashion. The case for delegation rests on the assumption that employers are in a better position to understand their labor needs than the government is. The government can superimpose other requirements (such as English-language ability) in order to minimize the risk that employers will choose people who are ill equipped to live in the country or integrate, but there is no reason to abandon delegation altogether.<sup>73</sup>

Even if the government is interested not only in solving the problem of labor shortages, and instead also wants to add human capital to the country, it is not clear the state is best equipped to pick those who will be the most economically productive and socially beneficial. Certainly it is easier for the state to do so with respect to highly educated people because at least in those contexts there are objective criteria like awarded degrees and English-language ability. But these are often crude measures, in the same way that LSAT scores and undergraduate GPAs only crudely predict who will become the most successful lawyers. The US government is not well equipped to determine whether a degree in economics from a university in Taiwan is equivalent to a degree in economics from a university in Norway, South Africa, or Peru. It is even less able to evaluate work experience in different types of firms in different places around the world. Employers have specialized experience in evaluating candidates for employment and therefore are in a stronger position than the state to determine the quality of migrants' human capital.

## 2. Employer sponsorship.

One could argue that, even if employers have better information about migrant types than the government does, the best system would be one in which employers provide that information to the government and then the government acts on it. The government could, for example, conduct surveys of employers' labor needs, aggregate the information, and then allocate visas on the basis of what it learns.

The problem with such a system is that employers have no incentive to provide accurate information to the government. All employers benefit from a large labor pool, and so all employers will have a strong

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<sup>73</sup> Consider Papademetriou and Sumpston, *Rethinking Points Systems* at 3 (cited in note 67) (criticizing points systems because arriving workers often are unable to find jobs). This is consistent with our point that the points systems do not necessarily select the most valuable workers, but their immediate concern could be addressed with a dual requirement that migrants who are qualified on the basis of points must still obtain a job prior to receiving a visa.

incentive to tell the government that they face labor shortages even when they do not. The government might admit low-value workers as well as high-value workers, but employers could engage in sorting if and when they decide they need to hire more people; thus, employers can avoid these sorting costs if they decide that they do not need additional employees. If the government follows the advice of employers, it will either end up admitting too many workers or allocating visas randomly rather than to the most productive workers.

Employer sponsorship solves this problem by requiring employers to bear some of the cost of admission. Employers must incur the cost of identifying particular migrants and of complying with bureaucratic procedures if they want the US government to issue visas for prospective employees. Employers will incur these sponsorship costs only if they expect a benefit from them, which means that they actually expect to hire the worker and obtain returns high enough to cover the costs. Sponsorship rules should greatly reduce admission of low-value workers.

### 3. Temporary and permanent workers.

In the US system of delegation, one major distinction is that between temporary and permanent workers. Temporary and permanent workers have different purposes: in theory, temporary workers augment the labor supply after an exogenous shock causes wages to rise, while permanent workers augment the population with people who have valuable skills and politically compatible preferences. Employers will internalize more of the costs and benefits of temporary workers simply because temporary workers are more likely to remain with the employer during their entire stay, while permanent workers are more likely to find another job. Thus, it makes sense to give employers who hire temporary workers greater screening authority than employers who hire permanent workers.

The law reflects this conclusion in three ways. First, the quality standards for admitting permanent workers are higher than the standards for admitting temporary workers.<sup>74</sup> Thus, an employer may screen

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<sup>74</sup> For empirical evidence, see US Citizenship and Immigration Services, *Approval and Denial Statistics for I-140, Immigrant Petitions for Alien Workers* (DHS Feb 28, 2011), online at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2be702798785e210VgnVCM100000082ca60aRCRD&vgnnextchannel=cdf2f8b69583210VgnVCM100000082ca60aRCRD> (visited Nov 25, 2012) (listing approval and denial rates for petitions for classification as an "Alien of Extraordinary Ability," the first preference category for permanent workers; the yearly acceptance rate ranges from 49 to 62 percent from 2005 to 2010). Compare US Citizenship and Immigration Services, *Fiscal Year 2009 Annual Report* at ii, 4 table 1 (cited in note 38) (listing an approval rate for H-1B temporary visas of 87 percent



in relatively low-quality workers for three to six years, but not permanently. Second, although the employer of temporary migrants must prove that the applicant will receive the prevailing wage<sup>75</sup> and that her presence will not harm US workers,<sup>76</sup> it need not attempt recruitment of Americans for the position, as is required by the labor-certification process for permanent workers.<sup>77</sup> Third, workers admitted on a temporary basis must generally leave the country early if they lose their position with the sponsoring employer.<sup>78</sup> This means that employers can admit temporary workers only to the extent that those workers continue to work for the sponsoring employer. There is no such condition for employers who screen in permanent workers.

#### 4. Portability.

Under the INA, temporary labor visas significantly restrict the labor mobility of migrants. For some visa categories workers are categorically prohibited from quitting and finding a new job in the United States.<sup>79</sup> The visa is tied to the employee's sponsoring employer, and he cannot be sponsored for a new visa unless he departs the United States. The H-1B visa relaxes these restrictions a bit,<sup>80</sup> but all temporary visas come with limited portability at best.

These post-entry restrictions on labor mobility have complex effects on the incentives of the employer and the temporary worker. Because the worker often cannot quit and find a new job, the employer can underpay her after she has arrived and in this way earn

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in FY 2009), with *H-2A Re-engineering, Braceros*, 15 Rural Migration News (UC Davis Jan 2009), online at [http://migration.ucdavis.edu/rmn/more.php?id=1408\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1408_0_4_0) (visited Nov 25, 2012) (indicating that 97 percent of employer applications and 96 percent of the jobs employers wanted to fill with H-2A workers were approved in FY 2007 and noting that “[u]nlike the H-1B . . . program[], there is no cap or ceiling on the number of H-2A visas that can be issued”).

<sup>75</sup> 8 USC §§ 1188(c)(3)(B)(i), 1182(n)(1)(A)(i)(II). See also 20 CFR § 655.10 (describing process to determine prevailing wages for temporary labor certification purposes); 8 USC § 1182(n)(3)(A)(i).

<sup>76</sup> 8 USC § 1188(a)(1)(B).

<sup>77</sup> 8 USC § 1182(n)(1)(G)(i).

<sup>78</sup> 8 USC § 1184(n).

<sup>79</sup> See, for example, 8 USC § 1188(i)(1) (requiring, for H-2A eligibility, that a migrant not be an “unauthorized alien”); 8 USC § 1324a(h)(3) (defining an “unauthorized alien” as one who is neither “lawfully admitted for permanent residence” nor “authorized to be so employed”). This indicates that a migrant must be pre-authorized for employment to be eligible for an H-2A visa—as such, a migrant cannot quit her current job and seek alternate employment within the United States.

<sup>80</sup> See 8 USC § 1184(n) (providing that H-1B visa holders are “authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant,” but also providing that “[i]f the new petition is denied, such authorization shall cease”).

rents on the admission.<sup>81</sup> By the same token, because potential migrants know that they may be underpaid and without recourse, they may be reluctant to apply for visas in the first place. The employer and worker may mitigate this effect by contract but, as always, it is not clear that a contract can anticipate all future contingencies or that the worker will, as a practical matter, be able to enforce it after she has returned to her home country.

The lack of portability might be defended as a method for rewarding employers for undertaking the task of screening on behalf of the government. The employer must invest in finding foreign workers that suit its needs and then must underwrite the cost of the migration process. An employer will not incur these costs unless it can be guaranteed a return—in the form of wages that are below the prevailing American wages. To be sure, employers face a similar problem when they try to recruit domestic workers: they may incur considerable expense in finding and recruiting workers, hire them, and then lose them to a competitor a short time later. But this problem is more significant for migrant workers. In domestic contexts, prospective employees apply for positions because they want the position. In the visa context, however, they often have twin motivations: they want the job, but they also want the visa. Once they have received the visa, therefore, there should be a higher probability that they will choose to leave the initial employer than there would be for an employee hired in a purely domestic context. Thus, by coupling one's ability to enter the United States to one's ability to get a labor visa, the INA introduces a distortion into the employer-employee matching market—in the form of strategic behavior by prospective employees. This distortion might lower the employer's incentive to screen, and so can be offset by restricting visa portability, thereby permitting the employer to obtain above-market rents. In addition, if the employer rather than the temporary migrant receives the surplus, that money will ultimately benefit (mostly) Americans (shareholders, customers who receive lower prices) rather than (mostly) foreigners, who will benefit from remittances and the worker's expenditures after she returns to her country.

However, the lack of portability also creates a deadweight loss: Workers may have difficulty moving to employers where they would be more productive. Even if the visa system were restructured so that employees could pay prior employers to release them, this anticipated cost would suppress the incentive to apply for temporary

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<sup>81</sup> See Papademetriou and Sumption, *Rethinking Points Systems* at 4 (cited in note 67).

work in the first place. The employer will also have a perverse incentive to overinvest in the worker's firm-specific human capital rather than in her country-specific human capital, so as to minimize her ability to find another sponsor and switch jobs. Moreover, the incentive system is crude. Employers receive a payoff that increases with the productivity of the worker, which will encourage employers to choose the best workers but not necessarily the workers who produce positive externalities in the form of conformity to the law and other characteristics or activities.

Possibly reflecting this concern, Congress amended the portability rule in 2000 so that temporary workers can move to new employers when they file a petition for a new H-1B visa rather than when their petition is accepted (as required under the old rule).<sup>82</sup> This amendment mitigates the negative effects of a lack of portability but does not eliminate them. Of course, it also undermines any benefits that flow from labor-mobility restrictions.

#### 5. The labor-shortage requirement.

The central question in immigration applications is whether the applicant seeks a position for which there is a labor shortage. In some cases, the government lists occupations for which it believes that shortages exist.<sup>83</sup> In other cases, the employer must prove that a shortage exists by showing that it cannot find a US worker willing to fill the position even though the employer offers the position at the "prevailing wage."<sup>84</sup> The prevailing-wage standard is nonsensical. If a prevailing wage exists, then US workers would be willing to fill the job (at that wage). And if the employer must pay the prevailing wage to the migrant (as it must), then the employer gains no benefit by hiring that person—hiring the person does not reduce labor costs. We suspect that employers manipulate the prevailing wage requirement by paying foreign workers less than US workers are willing to accept.<sup>85</sup>

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<sup>82</sup> See American Competitiveness Act § 105, 114 Stat at 1253, codified at 8 USC § 1184(n) (increasing the portability of H-1B status by allowing a nonimmigrant's employment status to continue until her new petition is adjudicated).

<sup>83</sup> The Department of Labor lists such occupations on Schedule A. See 20 CFR § 656.5 (including nurses, physical therapists, and a few other job categories).

<sup>84</sup> See 8 USC § 1188(a)(1)(A) (requiring the employer to show a labor shortage); 8 USC § 1188(c)(3)(B)(i) (requiring the employer to pay the prevailing wage).

<sup>85</sup> On both theories, labor migration will depress US wages. For some suggestive evidence, see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 142–43 (Princeton 2004) (arguing that the Bracero guest-worker program in the 1940s coincided with stagnation of farm wages in the South over the next few decades).

One theory for a labor-shortage requirement is that, in the absence of such a requirement, employers would sponsor migrant workers who impose high negative externalities on society, for example, people likely to become criminals or public charges, or people who will likely fail to assimilate in other ways. To minimize these costs, the government might authorize employers to sponsor migrant workers only when they generate a relatively high surplus—which will be partly enjoyed by employers and partly transformed into public revenue through the tax system. But if this is the goal of the labor-shortage requirement, it would need to be transformed so that it makes economic sense. As we discussed in Part II.B, a revised labor-shortage requirement could limit visas except when an exogenous shock increases the demand for labor well beyond historical levels, as in the case of the dot-com boom in the 1990s. When labor demand exceeds supply, the surplus generated by hiring will be greater than normal, and thus the tax revenues benefiting society will be greater than normal as well. These increased tax revenues would offset the negative externalities from the migration.

On this approach, however, the labor-shortage requirement is poorly designed and should be changed. Instead of requiring the employer to prove that it cannot find a US worker at the prevailing wage (which is impossible), the government should require the employer to show that the wages of US workers in the relevant industry have increased at historically unprecedented rates. In theory, the precise threshold would be the rate at which the extra tax revenue (and other benefits) from hiring a migrant exceeds the expected negative externalities associated with that migrant. In practice, the government would need to use a cruder threshold, but we expect that one could be formulated, based on historically abnormal wage increases and similar factors.

Another view is that the current system is adequate because its overall effect is to impose a cost on employers, which will discourage them from hiring marginal migrant workers who would impose negative externalities greater than their benefits. If the labor certification requirement is a sham, then employers must satisfy it by paying a lot of money to lawyers, consultants, and others, so as to provide the documentary evidence that will satisfy the immigration authorities. This is, in effect, a tax. It follows that employers will decline to sponsor migrant workers who contribute only marginally to their profits and will focus their energies on sponsoring migrant workers who contribute a great deal to their profits—professionals like computer programmers rather than, say, factory workers. Assuming that negative externalities

among potential migrant workers do not vary much, then a system that admits high-surplus workers and rejects low-surplus workers is more likely to be socially beneficial than one that does not distinguish them.

If labor certification operates as a tax, society would do better if employers paid an actual cash tax to the Treasury rather than, in effect, burning money on paperwork. Additionally, the tax should not be a constant amount but should be a function of the negative externalities that a migrant worker imposes on society. If some migrant workers impose high negative externalities, then the employer should be required to pay a high tax; when migrant workers do not impose negative externalities, the tax should be low or zero.

There is a tension between enlisting employers in the screening process by encouraging them to sponsor migrants and penalizing them for sponsoring migrants because they create negative externalities. Earlier, we suggested that the portability rule encouraged employers to sponsor high-value workers by giving employers a large portion of the surplus generated by employment. If employers went to the expense of sponsoring a worker, and then the worker immediately quit and found work with a competitor, employers would not sponsor workers in the first place. But if we believe that workers impose negative externalities, then we should tax employers who sponsor migrants. How do we resolve this tension?

An indirect solution is to permit the employer to capture enough of the surplus that it is worthwhile to sponsor the migrant while supplying the rest of the surplus to the government to offset any costs the migrant imposes on the state. As we noted above, the portability rule is probably too crude for this purpose. Portability restrictions encourage an employer to invest more in screening because the surplus captured by the employer is correlated with the productivity of the migrant it picks. But this incentive is undercut by the fact that portability restrictions also reduce the migrant's bargaining power, which may allow the employer to pay the migrant a wage that is below the US market rate. Moreover, a truly incentive-compatible rule would reward employers for directly taking into account the potential social externalities produced by the immigrant worker, and nothing in the portability rules does this.

6. Ex ante and ex post screening: The transition from temporary to permanent status.

A traditional rule is that foreign workers who seek temporary status must attest that they do not intend to seek permanent residence.

They must lack immigrant intent in order to receive the visa.<sup>86</sup> A related rule is that holders of H-1B visas had to have a permanent foreign residence.<sup>87</sup> Both rules have eroded over the years.<sup>88</sup>

These rules were likely driven by the concern that foreign workers would game the system by first obtaining a temporary visa and then, once in the United States, taking advantage of a path to citizenship. For example, it would be easier for someone in the United States for three years to arrange a sham marriage with a US citizen than for someone living in a foreign country where access to potential American spouses is more limited. Or some people might plan to overstay their visa and hope for an amnesty, which periodically recurs. Or they might hope that contact with American employers will make it more likely that they will be able to persuade an employer to sponsor them for a permanent labor visa. To screen out such people, the law required evidence that they planned to return to their home country after their visa expired, and had a financial reason—such as a foreign residence—to do so.<sup>89</sup>

Why might these rules have eroded? One possible reason is that often the best evidence of a person's suitability as a permanent resident comes from her experience on American soil. Indeed, many people who spend three years in the United States may voluntarily return home because they decide they prefer to live in their native country. Among those who seek permanent residency, their experiences in the United States—whether they obtained and kept a job, paid taxes, avoided crime, learned English, or were integrated into their communities—provide useful evidence as to the likelihood that they will continue to be successful as permanent residents. As we have discussed elsewhere, the immigration system has therefore gradually undergone a transformation into a two-period approach, where migrants have more limited rights during a probationary period, successful completion of which facilitates application for permanent residence.<sup>90</sup>

The delegation question reemerges with respect to second-period evaluations of people who have already entered the United States on temporary visas and seek to remain permanently. Again,

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<sup>86</sup> See 8 USC § 1101(a)(15)(B), (F), (J).

<sup>87</sup> See 8 USC § 1101(a)(15)(O)(ii)(IV).

<sup>88</sup> See Aleinikoff, et al, *Immigration and Citizenship* at 400–01 (cited in note 28) (describing the “dual intent doctrine,” which provides that “a desire to remain in [the United States] permanently in accordance with the law . . . is not necessarily inconsistent with lawful nonimmigrant status”), citing *Matter of Hosseinpour*, 15 I&N Dec 191, 192 (BIA 1975).

<sup>89</sup> See 8 USC § 1101(a)(15)(O)(ii)(IV).

<sup>90</sup> See Cox and Posner, 59 Stan L Rev at 824–27 (cited in note 12).

the state could directly evaluate the migrant by monitoring her behavior while on American soil. The state could question her directly about her activities, such as whether she committed crimes, held a job, learned English, made friends, and so forth; and in many cases, her answers could be verified by giving her tests and examining government records (for example, criminal records). The state could also delegate or partly delegate this ex post screening decision to agents such as employers, and indeed this is what happens in the United States. An employer effectively provides for the removal of the visa holder by firing her before her time has expired (unless she finds another sponsor); it could also help a temporary worker obtain permanent status by sponsoring her for a green card.<sup>91</sup>

Why would the government give the employer the de facto power to deport migrant workers through the act of firing them (or failure to sponsor them for green cards)? One possibility is that if the migrant is not a suitable worker for the sponsoring employer, then she is most likely not a suitable worker for any US employer. If the employer has better information about the worker's human capital, this rough judgment may well be good enough for public policy purposes. In addition, if the employer fires the worker not because of poor quality but because of poor economic conditions, then there is a risk that the worker will become a public charge, depress wages, or contribute to unemployment during an economic downturn, when there is often political hostility toward foreign workers. This view that temporary admission can serve as a probationary period, which permits better evaluation of the "quality" of the migrant, can be contrasted to a more popular view, which is that temporary migrants should be given permanent residence because they develop affiliations in the United States.<sup>92</sup> If this latter view is correct, then the two-period approach imposes an unacceptable hardship on migrants, and instead they should either be denied entry or be given permanent residence from the start. Whatever the merits of this idea, one should be clear that it has significant costs, as it deprives the state of important information for evaluating potential migrants, whose experiences in the state can provide a basis for determining their suitability as citizens.

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<sup>91</sup> See, for example, 8 USC §§ 1182, 1227 (specifying conditions under which aliens can be deported for violating the terms under which they were admitted); 8 USC § 1255 (discussing rules and procedures for the adjustment of status from nonimmigrant to that of a person admitted for permanent residence).

<sup>92</sup> For an example of the more popular view, see Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 80–114 (Oxford 2006), citing *Graham v Richardson*, 403 US 365 (1971).

## F. Choosing and Coordinating Multiple Agents

We have so far abstracted from a significant problem with delegation. By assuming that the government delegates to a single employer, we have avoided the question of how the government should choose among the thousands of employers who could serve as screening agents.

Imagine that the government has determined that 100,000 slots should be made available for permanent workers.<sup>93</sup> All employers would apply for these slots. Under a baseline randomization system, the slots would be randomly assigned to employers. If one million employers each apply for a single slot, then each employer would be given a one-in-ten chance of obtaining a slot. Of course, if employers can apply for more than one slot, they will strategically apply for more slots than they need in order to increase their chances of winning at least one in the lottery. In order to avoid these types of strategic behavior, employers' applications would be subject to a ceiling—for example, one that is determined by the size of the firm.

A randomization system would be quite crude because it would not ensure that the highest-value workers end up at the highest-value employers. Those employers who obtained a slot would search out the highest-value workers for them, but it is possible that those workers would be more suited for different employers who did not win the lottery, or that different worker-employer matchups would be more productive. This problem could be ameliorated if the slots were tradable. Employers with higher-value opportunities would then buy slots from employers who won the lottery.

Current immigration law in the United States resembles a randomization system. All employers may seek slots; if they seek more than are available, the slots are distributed at random.<sup>94</sup> There are a few additional screening elements that increase the cost for the employer. Employers must show that the migrant is (in most cases) highly educated and skilled, and hence highly productive. In addition, the employers must obtain a labor certification that shows (or purports to show) that employment of the migrant will not lower the wages of Americans or cause unemployment. The high cost and trouble of negotiating the immigration bureaucracy may serve as a limited screening mechanism, ensuring that employers will not attempt to obtain slots for workers who fall below a threshold of

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<sup>93</sup> We could also imagine a system in which the government delegated to employers the power to decide how many migrants to admit in the first place, but such an approach is sufficiently remote to present day realities that it can be safely ignored.

<sup>94</sup> See 8 USC § 1153(e)(2).



productivity. There is a great deal of skepticism about whether the labor certification system works as intended, however.<sup>95</sup>

A more direct approach would be for the government to auction off the slots. Now, the highest-value employers would purchase the slots, and those highest-value employers would import the highest-value workers for their positions. Although auctions must be carefully designed, and can be gamed, an auction would be superior to the baseline randomization system.

Legal scholars and economists have occasionally suggested the possibility of auctioning employment visas.<sup>96</sup> But they have always assumed that the workers themselves would bid for the visas; to our knowledge, no one has considered an approach in which employers rather than workers bid for visas. An employer-centered approach has a number of advantages. First, employers will face fewer capital constraints than foreign workers who, without a source of capital, may not be able to bid very high for visas. (Economists typically assume away the migrants' capital constraints by stipulating that they can borrow against their future earnings, but there are many reasons to think that employers will face fewer capital constraints than overseas migrants, given how credit markets actually function.) Second, employers have considerably better information about employment opportunities in the United States than potential migrants do. Third, the employer auction would represent a relatively small change to the existing labor immigration system, while a direct auction to migrants strikes many people as a radical, and politically infeasible, change to immigration law.

### III. FAMILIES

#### A. Family-Reunification Rules

Today family reunification is a core feature of American immigration law. Historically, however, it played a much smaller role. When Congress first enacted general numerical restrictions on immigration law in the wake of World War I, the quota system was based

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<sup>95</sup> See Papademetriou and Sumption, *Rethinking Points Systems* at 4–5 (cited in note 67). Concerns about whether the migrant will conform to American norms and values are addressed in other ways—for example, the removal of those who commit crimes. See Cox and Posner, 59 *Stan L. Rev.* at 819–21 (cited in note 12).

<sup>96</sup> See, for example, Gary S. Becker, *The Challenge of Immigration—A Radical Solution* 27 (Institute of Economic Affairs 2010), online at <http://www.iea.org.uk/sites/default/files/publications/files/IEA%20Challenge%20of%20Immigration%20web.pdf> (visited Nov 25, 2012) (proposing that anyone who pays a fee be admitted as a migrant); Julian L. Simon, *The Economic Consequences of Immigration* 357–64 (Michigan 2d ed 1999).

on national origin.<sup>97</sup> While some limited family-based migration was permitted,<sup>98</sup> the modern migration categories—under which the vast majority of visas are allocated on the basis of labor demand or family connections—did not exist.

Congress abolished the national origins quota system in the Immigration and Nationality Act of 1965<sup>99</sup> (“Hart-Celler Act”) and put in place a new framework for allocating visas. The new framework relied primarily on family-based migration:<sup>100</sup> nearly three-fourths of the visas were allocated for qualifying relatives.<sup>101</sup> Today, nearly half of all the visas awarded for permanent residence each year are awarded under this system.<sup>102</sup>

The family-based visa allocation rules are exceedingly intricate, involving a number of different preference categories and complex quota formulas.<sup>103</sup> To understand the basic structure, however, it is important to recognize that all family-based visas must begin with a petition by a sponsoring relative already living in the United States.<sup>104</sup> Thus, one must distinguish between two important questions: (1) Which existing residents are permitted to sponsor their family members for visas, and (2) who may be sponsored for a visa by a resident family member?

Both citizens and LPRs are permitted to sponsor relatives for family-based visas. But the immigration code treats citizens more favorably than LPRs. First, citizens are exempt from numerical restrictions on visas when they seek to bring in their “immediate relatives”—defined as spouses, unmarried minor children, and (in some

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<sup>97</sup> See Ngai, *Impossible Subjects* at 21–55 (cited in note 85).

<sup>98</sup> See, for example, The Emergency Quota Act, Pub L No 67-5, ch 8, 42 Stat 5 (1921) (specifying quotas for immigrants based on national origin but also giving preference to certain relatives of US residents, including spouses and unmarried minor children). See also John Higham, *Strangers in the Land: Patterns of American Nativism 1860–1925* 310–11 (Atheneum 1963). This system was in place from 1921 until 1965.

<sup>99</sup> Pub L No 89-236, 79 Stat 911, codified as amended at 8 USC § 1101 et seq.

<sup>100</sup> See Hart-Celler Act § 1, 79 Stat at 911.

<sup>101</sup> See Marc R. Rosenblum, *US Immigration Reform: Can the System Be Repaired?* \*4 (UC San Diego, Center for Comparative Immigration Studies Working Paper No 132, Jan 2006), online at <http://ccis.ucsd.edu/wp-content/uploads/2012/07/wrkg132.pdf> (visited Nov 25, 2012).

<sup>102</sup> See Office of Immigration Statistics, *2010 Yearbook of Immigration Statistics* 18 table 6 (DHS Aug 2011), online at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf) (visited Nov 25, 2012).

<sup>103</sup> See 8 USC § 1153. For a description of these categories and formulas by the Department of State, see Bureau of Consular Affairs, *Family-Based Immigrant Visas* (Department of State 2012), online at [http://travel.state.gov/visa/immigrants/types/types\\_1306.html](http://travel.state.gov/visa/immigrants/types/types_1306.html) (visited Nov 25, 2012).

<sup>104</sup> 8 USC § 1153(a).

circumstances) parents.<sup>105</sup> LPRs, on the other hand, are subject to quota restrictions even for these immediate family members.<sup>106</sup> Second, citizens have larger allocations under the quotas for relatives who are not immediate family members. Therefore, citizens have an easier time than LPRs bringing in siblings, parents, and adult children.

Relatives who may be sponsored by citizens or LPRs include spouses, both minor and adult children, parents, and siblings.<sup>107</sup> Before 1965, the little family migration available was limited to spouses and minor children. Hart-Celler dramatically expanded the types of family relationships that could serve as the basis for a visa application. Nonetheless, with the exception of those noncitizens who qualify as immediate family members, prospective beneficiaries of family-related visas are subject to quotas. The numerical limit applicable for any particular migrant, which is far too complex to explain in detail, turns on three principal factors.<sup>108</sup> First, it turns on the nature of the familial relationship, with spouses and children generally receiving preferential treatment over brothers and sisters. Second, the quota depends on whether the sponsoring resident is a citizen or LPR; LPRs currently face a multiyear backlog for spousal and child admissions, while citizens can bring in spouses and minor children without regard to the quotas. Third, the quota turns in part on the country from which the relative is emigrating.<sup>109</sup> The employment- and family-based preferences are subject to per-country limits, which place ceilings on the number of otherwise qualifying migrants who may come from a single country in any given year. The limit, which is roughly twenty-five thousand per country,<sup>110</sup> has led to backlogs of more than ten years for some relatives immigrating from Mexico and the Philippines.<sup>111</sup>

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<sup>105</sup> An unmarried minor child is excluded from the definition of immediate family if she is born outside of marriage to a citizen father, but she is not excluded if born to a citizen mother. See *Fiallo v Bell*, 430 US 787, 797–800 (1977) (upholding this differential treatment on the basis of the parent's sex).

<sup>106</sup> Compare 8 USC § 1151(b)(2)(A)(i) (excluding “immediate relatives” of US citizens from quota limits), with 8 USC § 1153(a)(2) (subjecting even the spouses and children of LPRs to quota limitations).

<sup>107</sup> 8 USC §§ 1151(b)(2)(A)(i), 1153(a)(2).

<sup>108</sup> 8 USC § 1151(c).

<sup>109</sup> Technically it turns on location of birth rather than nationality or place of emigration, but these typically coincide in practice.

<sup>110</sup> 8 USC § 1152(a).

<sup>111</sup> See Bureau of Consular Affairs, *Immigration Numbers for November 2012*, 9 Visa Bull 50 (US Department of State Nov 2012), online at [http://www.travel.state.gov/pdf/visabulletin/visabulletin\\_november2012.pdf](http://www.travel.state.gov/pdf/visabulletin/visabulletin_november2012.pdf) (visited Nov 25, 2012).

## B. Possible Justifications for Delegating Admissions Authority to Family Members

Why might a state give citizens (and sometimes LPRs) the option of selecting new immigrants from within the pool of their eligible family members? Unlike labor migration, where the informational advantages of prospective employers are straightforward, delegation to family members presents a more complicated picture. Consider three possible reasons why a state might employ a family-based migration system: to respect the significance of family relationships to people's lives and therefore to privilege family reunification as an independent value; to speed the integration of new immigrants; and to promote the migration of people with racial and cultural characteristics that match the existing polity.

Each of these justifications for the system might help explain why the state would delegate screening authority to resident family members. But each also raises important agency issues.

### 1. Family reunification.

To the extent the state authorizes family migration because of a desire to permit citizens to live near to those they care about deeply, delegation provides some information about the closeness of the relationship. In almost all cases, the citizen or LPR must file a visa petition for a family member to receive an immigration benefit.<sup>112</sup> And in the case of spouses, the US resident obviously must choose to marry the person for the qualifying relationship to exist. The sponsoring resident has far better information than the government about how close she is to her relatives. After all, parents and children are not always close. It might waste limited immigration slots to permit family members to enter the United States without asking the resident to reveal whether she cares sufficiently about the relationship to file a petition on the family member's behalf.

Of course, if respecting close family relationships or intimate relationships more generally is the state's principal concern, the current rules clearly fall short. They define qualifying family relationships in a way that privileges mainstream cultural understanding of family.<sup>113</sup> They are also biased against those whose most significant

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<sup>112</sup> See note 104 and accompanying text.

<sup>113</sup> This is an observation about marriage rules frequently made outside the immigration context. See, for example, Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va L Rev 385, 437–54 (2008) (discussing how the “norms attendant to the institution of heterosexual marriage” inform family law); Laura A. Rosenbury, *Friends with Benefits?*, 106 Mich L Rev 189, 189–93 (2007) (“[F]amily law’s failure

relationships are not with family members at all. These shortcomings could be ameliorated by a broader delegation. Each citizen (or LPR) could be given a small number of immigration slots and permitted to sponsor whomever he wished for a visa. But closeness is surely not the state's only concern. Such a delegation would undercut the state's ability to use the immigration system to promote traditional notions of family—a power the state has employed regularly throughout immigration history.<sup>114</sup>

Perhaps even more importantly, delegating to existing citizens the power to pick one or more migrants would exacerbate a serious agency issue that the current system of family migration already faces. The agency problem is this: in a world where the migration benefit is very valuable, the government's agent may simply sell the benefit. The current system addresses this problem in part by limiting the scope of prospective migrants who can be sponsored by an existing citizen or LPR. The number of overseas family members is much smaller than the total number of noncitizens who might like to purchase a green card. The current system also relies for the most part on qualifying relationships that cannot be manufactured. Under most circumstances, one has no control over the identity of one's parents or siblings. And while citizen children can sponsor their noncitizen parents for visas, the code prohibits *minor* children from doing so<sup>115</sup>—thereby preventing noncitizens from coming to the United States and giving birth to a citizen in order to acquire an immediate immigration benefit for themselves.

Nonetheless, there is one qualifying relationship that is voluntary: the relationship of spouses. This raises a serious concern that citizens will sell immigration benefits by entering into sham marriages.

Historically, the government tried to police this behavior by monitoring marriage choices directly, inquiring into whether a marriage is “real” or instead fraudulent. The spousal-immigration rules did this principally by relying on *ex ante* screening—that is, by attempting to identify fraudulent marriages only at the point of admission, when the

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to recognize friendship impedes existing attempts to achieve gender equality through the elimination of state-supported gender role expectations”).

<sup>114</sup> Examples include the policing of marriage practices among Chinese immigrants during the nineteenth century, the differential treatment of mothers' and fathers' relationships with their children, and the exclusion of same-sex couples in recent years. See Stanford M. Lyman, *Marriage and the Family among Chinese Immigrants to America, 1850–1960*, 29 *Phylon* 321, 324 & n 13 (1968); *Fiallo*, 430 US at 797–800 (upholding differential treatment on the basis of the parent's sex). For a discussion of the exclusion of same-sex couples, see notes 130–31 and 153–54 and accompanying text.

<sup>115</sup> 8 USC § 1151(b)(2)(A)(i) (requiring that children sponsoring their parents “be at least 21 years of age”).

visa would be granted.<sup>116</sup> Relying on ex ante screening had serious problems. The government could ask intrusive personal questions to try to figure out whether the couple had entered into a real marriage rather than a phony one. But it was easy for couples to dupe the immigration service—as Gérard Depardieu and Andie MacDowell did in the 1990 movie *Green Card*—simply by living together briefly and learning the details of each other's life.<sup>117</sup>

To combat this problem, the Immigration Marriage Fraud Amendments of 1986<sup>118</sup> revised the immigration code to establish a two-stage screening system for spousal migration.<sup>119</sup> Today, a newly married couple cannot get an ordinary green card for the noncitizen spouse.<sup>120</sup> Instead, the spouse can initially obtain only a “conditional” LPR visa.<sup>121</sup> Unlike other visas conferring LPR status, the conditional LPR visa expires after two years and is stamped prominently with its temporary status.<sup>122</sup>

The conditional status introduces ex post screening into the spousal-visa process. At the end of the two-year, conditional period, the spouses must *jointly* file papers with the federal government in order to lift the conditional status.<sup>123</sup> The filing requires that the couple include information about employment history (like pay stubs), place of residence, and so forth.<sup>124</sup> They are sometimes also required to attend a joint interview.<sup>125</sup> These steps provide additional information to the government that it can use to determine whether the marriage is valid—information that would not have been available for newlyweds at the point when the visa initially was issued.<sup>126</sup> Rather than rely entirely on an easy-to-game and subjective interview process, the government can acquire more objective evidence about whether the couple has cohabited, shared financial obligations, and otherwise lived the joint life that most married couples live. A couple

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<sup>116</sup> See Cox and Posner, 59 Stan L Rev at 836–37 (cited in note 12).

<sup>117</sup> *Green Card* (Touchstone Pictures 1990).

<sup>118</sup> Pub L No 99-639, 100 Stat 3537, codified as amended at 8 USC § 1101 et seq.

<sup>119</sup> Immigration Marriage Fraud Amendments § 2, 100 Stat at 3537–39.

<sup>120</sup> See Immigration Marriage Fraud Amendments § 2, 100 Stat at 3537–38.

<sup>121</sup> 8 USC § 1186a(a)(1).

<sup>122</sup> 8 USC § 1186a (describing conditional status); 8 USC § 1227(a)(1)(G) (describing the two-year review and potential subsequent removal).

<sup>123</sup> 8 USC § 1186a(c)(1)(A).

<sup>124</sup> 8 USC § 1186a(d)(1).

<sup>125</sup> See 8 USC § 1186a(c)(1)(B). But see 8 USC § 1186a(d)(3) (permitting the Secretary of Homeland Security to waive the interview requirement).

<sup>126</sup> In addition, if the couple does not follow these requirements, the sponsored spouse's visa will expire, and the prominent stamp will make it difficult for the noncitizen to continue to live in the United States without detection. See 8 USC § 1186a(c)(1)–(2). It is harder, therefore, for the couple to avoid this second stage of screening.

in a sham marriage can, of course, also live a joint life for this two-year period in order to pass the ex post screen, but it is much more costly for them to do so than for a legitimately married couple. Thus, the new system imposes relatively lower costs on valid marriages than on fraudulent marriages and, in theory, can help align the incentives of the citizen-agents.<sup>127</sup>

The development of the marriage fraud rules highlights the fact that there will often be two ways that the government might try to reduce principal-agent slack when it delegates immigration authority. It can directly monitor the agent's performance. This will often be difficult, however, because the private information that justifies delegating to the agent in the first place also makes it difficult for the government to evaluate the agent's performance. Therefore, the government will often be more successful if it can structure immigration law to create incentive-compatible contracts for its agents—contracts that provide greater rewards to the agent, or are less costly to comply with, when the agent acts consistently with the government's interests. The evolution of the spousal-immigration rules reflects a move away from the first strategy and toward the second.

## 2. Integration and social externalities.

Family-based migration can also be seen as a way of promoting integration among recent arrivals. To be sure, there are many ways a state might use its admissions system to promote integration. Many states—particularly states with relatively homogenous racial or ethnic compositions—have historically used the race or ethnicity of entering migrants as a proxy for their assimilability.<sup>128</sup> Beyond the fact that many believe race-based immigration criteria to be morally repugnant, such an approach has obvious practical limitations in diverse countries such as the United States. Family-based admissions

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<sup>127</sup> The sponsor's continuing control over the immigrant's lawful status in the country does give the sponsor significant control over the immigrant. In the employment context this raised the possibility that employers would exploit immigrants who lacked visa portability. In the marriage context this raises concerns about exploitation or abuse by the sponsoring spouse. To ameliorate this problem, the immigration code includes a limited exception to the joint petition requirement. See 8 USC § 1186a(c)(4)(B) (providing an exception if the marriage was "entered into in good faith," but has been terminated "and the alien was not at fault," in failing to meet the joint interview requirement). The immigration code also includes a special visa category for those who are the victims of abuse at the hands of their sponsoring spouses. See 8 USC § 1186a(c)(4)(C) (providing the "Hardship waiver" requirements).

<sup>128</sup> See Eytan Meyers, *Theories of International Immigration Policy—A Comparative Analysis*, 34 Intl Migration Rev 1245, 1251–57 (2000) (examining immigration systems in different countries, including an analysis of the "national identity" approach to immigration employed by homogenous countries such as Japan and Germany).

may do considerably better than this crude proxy. For as we have explained elsewhere, immigrants may be able to integrate more quickly and easily if they have existing family in the receiving state who can provide social ties, financial support, and valuable information about the immigrant's new home.

On this account, the state can also capitalize on the private information and interests of citizens (and LPRs) by delegating to them the power to pick immigrants from among their family members. As we explained above, citizens have better information about whether they are close to their qualifying relatives. Here that information is useful because citizens are much more likely to provide support to immigrating relatives if they feel close to them. Permitting relatives to apply for family-based visas without a sponsor, therefore, would undermine the usefulness of the family migration system as a means of promoting integration. Relatedly, citizens are more likely than the government to have a good sense of which close family members are likely to flourish in the United States. Since these citizens are also likely to take to heart the interests of these family members, they may be unlikely to encourage a family member to migrate if it is likely that person would be miserable in the United States and would become dependent on her US relatives for financial support. Indeed, citizens would likely encourage foreign relatives to immigrate to the United States precisely when they expect their relatives to prosper and be able to contribute financially and in other ways to the family in the United States.

But there are two shortcomings with this approach. For one thing, a citizen can pick only from among his own qualifying relatives. Even if he will do a better job than the government of picking successful immigrants from among those relatives, there is no reason to believe he will have a better sense of whether his own family members will be better bets than other citizens' family members or other prospective migrants who have no family members in the United States.

An even more serious problem is that, like employers, resident family members might ignore some migration costs about which the government cares deeply. While a citizen may discourage her brother from immigrating if she thinks he will be miserable, her private calculation about his happiness may ignore various public values the state wishes to promote. For example, the state may want to pick migrants who already know English or will quickly learn it. But the sister may not worry about whether her brother is likely to learn English if she thinks that he will be able to get along fine while still



speaking only his native language. Or, more generally, the state may worry about the fiscal burden the migrant could impose down the road if he ends up not being successful in the labor market. His sister might discount this risk more than the state because she will not bear the cost herself.

To ameliorate these problems, the state might simply take some discretion away from existing residents by putting additional restrictions on which family members they can sponsor. For example, the state could require that qualifying family members pass a language test before receiving a visa.<sup>129</sup> Or the state could prohibit a citizen from sponsoring his spouse if their marriage did not conform to certain norms regarding sex equality or sexuality. The INA does not impose the former restriction on family reunification, but it does impose the latter. Spouses in plural marriages cannot obtain a spousal visa.<sup>130</sup> Same-sex couples have also historically been prohibited from qualifying for such a visa.<sup>131</sup> Other countries have been even more aggressive about policing the private choices of citizens related to family reunification. Consider, for example, Denmark's recent changes to its family-reunification rules for spouses. Denmark has long permitted citizens to bring their spouses into the country. Several years ago it imposed a new restriction on these visas—making them unavailable if one of the marriage partners is under twenty-four years of age.<sup>132</sup> The restriction on qualifying marriages was designed to prohibit family reunification on the basis of arranged marriages among young, religious migrants—who the state feared were likely to be Arab and Muslim—and thereby discourage such marriages.<sup>133</sup> Worried that residents' private family-reunification decisions would be

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<sup>129</sup> For examples of systems taking account of language ability in the context of employment-based immigration, see CIC, *Six Selection Factors* (cited in note 10); Immigration New Zealand, *Skilled Migrant Category Points Indicator* (cited in note 67).

<sup>130</sup> See Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World without DOMA*, 16 Wm & Mary J Women & L 537, 583–86 (2010) (describing the general invalidity of plural marriages under immigration law in the United States).

<sup>131</sup> See *Adams v Howerton*, 673 F2d 1036, 1038–41 (9th Cir 1982) (denying marriage status to a same-sex couple under the immigration code because it is “unlikely that Congress intended to give homosexual spouses preferential admission treatment under [one section] of the Act when, in the very same amendments adding that section, it mandated their exclusion”).

<sup>132</sup> See Helena Skyt Nielsen, Nina Smith, and Aycan Çelikaksoy, *The Effect of Marriage on Education of Immigrants: Evidence from a Policy Reform Restricting Marriage Migration*, 111 Scandinavian J Econ 457, 462 (2009).

<sup>133</sup> See *id.* at 462 (describing the dual purposes of “the 24-year reform”: to reduce the number of arranged marriages and to “reduce the number of non-Western immigrants entering the country due to family reunifications”); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U Pa L Rev 341, 363 n 76 (2008).

insensitive to public values—in Denmark’s case, the state’s concern about the development of a large, homogenous bloc of religious Muslim migrants—the state removed some discretion from its citizen agents.

Rather than limiting discretion, the state might also try to force the petitioning family member to internalize the public values that matter to the state. For instance, if the government is worried about the potential future fiscal burden of a new migrant, it could require the petitioning party to bear some of the costs if the immigrant ends up being unable to support herself. The INA does something like this, requiring sponsoring relatives to pledge to financially support the relatives they are sponsoring.<sup>134</sup> One difficulty with this approach is that it may be difficult to enforce such pledges after the fact.<sup>135</sup> And even if the pledges are enforceable, financial stability is a rather crude measure of integration or other values about which the state cares—especially in family migration contexts, where the decision to admit is less directly connected to the labor market and to the fiscal issues that underlie the employment visa allocations. Thus, in practice it may be quite difficult to bring the sponsor’s incentives in line with the state’s.

### 3. Racial homogeneity.

The goal of racial homogeneity does not fit neatly into our informational account of the modern family admissions system. If the state’s goal is to admit migrants of particular races, the state does not face a significant information problem. Race is conventionally considered a highly visible characteristic. Therefore, the state can regulate the racial composition of the migrant pool by picking races explicitly, as the United States did in the Chinese Exclusion Act.<sup>136</sup> Or it can do so using proxies like nationality, as the United States did for

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<sup>134</sup> 8 USC § 1182(a)(4)(C)(ii) (stating that family-sponsored immigrants are inadmissible unless an affidavit of support by the sponsor has been submitted); 8 USC § 1183a (describing the required affidavit of support).

<sup>135</sup> See Charles Wheeler, *The Affidavit of Support and Sponsorship Requirements: A Critical Analysis*, 98 Immig Briefings 1, 6–8 (June 1998) (discussing the difficulties of enforcing the affidavit of financial support); Robert A. Mautino, Comment, *Sponsor Liability for Alien Immigrants: The Affidavit of Support in Light of Recent Developments*, 7 San Diego L. Rev 314, 314–23 (1970) (discussing the uncertainty of the legal enforceability of the affidavit of financial support).

<sup>136</sup> Ch 126, 22 Stat 58 (1882). The Act excluded all Chinese laborers and defined “Chinese” as a racial category rather than a nationality. Thus, the law covered a person of Chinese descent born in Peru in the same way it covered a person born in, and immigrating from, Shanghai.

many years in the national origin quota system.<sup>137</sup> There is no obvious informational advantage to delegating the screening decision to family members or other agents.

Still, it is often said that the creation of the modern system of family reunification in the United States was motivated in part by a desire to promote the migration of people with racial and cultural characteristics that match the existing polity. From 1921 to 1965, American immigration law regulated the racial and cultural composition of the migrant pool relatively directly through the national origins quota system.<sup>138</sup> When pressure finally led Congress to abolish the national origin quota system in 1965, many legislators supported the modern family-reunification rules because they believed those rules would largely replicate the results of the quota system.<sup>139</sup> The family-reunification system would replace a centralized allocation system with a delegation to multiple agents. But because these agents were thought to be likely to pick family members who shared their own racial, ethnic, or cultural backgrounds, the composition of the migrant pool would not change significantly.

On this account, delegation appears to be driven by a desire to obfuscate the effects of the admissions rules. The idea is that the public will not understand the consequences of delegating to family members or, if they do eventually realize that the system replicates the racial composition of the existing polity, will not hold legislators responsible for that result. In the congressional context, obfuscation and blame shifting is a frequent explanation for agency delegations.<sup>140</sup> The same logic appears to be at work here—though whether the public was actually duped is another question.

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<sup>137</sup> See Higham, *Strangers in the Land* at 310–11 (cited in note 98) (describing the US nationality quota system implemented in 1921).

<sup>138</sup> This system allocated immigration slots to each country on the basis of the number of people from that country who lived in the United States in 1910. See The Emergency Quota Act § 2, 42 Stat at 5 (limiting immigration “to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910”). See also Higham, *Strangers in the Land* at 310–11 (cited in note 98) (reporting that the quotas were designed deliberately to try to fix the ethnic composition of the United States as it existed during the first decade of the twentieth century).

<sup>139</sup> See, for example, Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* 324–36 (Harvard 2006); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 NC L Rev 273, 297–317 (1996) (examining the history surrounding the Immigration and Nationality Act of 1965).

<sup>140</sup> See generally David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policymaking under Separate Powers* (Cambridge 1999).

### C. Multiple Agents, Collective Action, and Path Dependency

While we have focused so far on the information and incentives of individual sponsoring family members, a central feature of the family migration rules is that they delegate immigration authority to a large number of potential sponsors. As with the labor migration rules, this feature significantly changes the consequences of the delegation.

Consider the idea that the family-reunification system was designed to replicate the national origins quotas—delegating to multiple agents who would pick new migrants who shared their racial and cultural backgrounds. While this idea appears to have motivated some legislators who voted for the system, things did not work out as these legislators had hoped. Today, petitions for family-based immigration are dominated by persons of Asian and Latin American descent—a quite different mix of migrants than would have been selected under the old national origin quotas.<sup>141</sup> Understanding how the family migration rules might have contributed to this state of affairs helps highlight the way in which the structure of delegation embedded in the family-based immigration rules—where the state gives limited admissions authority to a large number of agents—can promote or undermine the goal of admitting an ethnically or culturally diverse set of migrants.<sup>142</sup>

A rule permitting a state's existing residents to petition for the admission of their family members contains an implicit feedback mechanism. Foreign-born residents are much more likely than native-born citizens to have family abroad. They are also more likely than native-born citizens to marry noncitizens (many of whom will be either living abroad or living in the United States without a green

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<sup>141</sup> In 1960, the flow of LPRs was made up predominantly of Europeans: 75 percent of new green card recipients were from Europe, 9 percent were from Latin America, and 5 percent were from Asia. In 2010, 53 percent were from Latin America, 28 percent from Asia, and only 12 percent from Europe. Compare US Census Bureau, *Profile of the Foreign-Born Population in the United States: 2000* 11 figure 2.2 (Department of Commerce Dec 2001), online at <http://www.census.gov/prod/2002pubs/p23-206.pdf> (visited Nov 25, 2012) (providing the breakdown of immigrants by country of national origin over time), with US Census Bureau, *The Foreign-Born Population in the United States: 2010* 2 table 2 (Department of Commerce May 2012), online at <http://www.census.gov/prod/2012pubs/acs-19.pdf> (visited Nov 25, 2012).

<sup>142</sup> As we have explained in other work, there are plenty of reasons why a state might have preferences about the aggregate composition of the pool of arriving immigrants. For example, promoting heterogeneity in the migrant pool might facilitate integration and reduce the likelihood that the migration results in the large-scale social exclusion of an identifiable racial group. While diversity may also come with costs—which explains, in part, the longstanding debates about the virtues and vices of heterogeneous versus homogenous polities—for present purposes we remain agnostic about that question. Instead, we are interested in how the disaggregated structure of family admissions influences the composition of the pool of arriving immigrants. See Cox and Posner, 84 NYU L Rev at 1438 (cited in note 12).

card).<sup>143</sup> Consequently, family-reunification rules delegate admission authority to multiple agents, but the agents are principally foreign-born residents.

In short, the migrants who enter in period one become a large fraction of the people to whom power is delegated in period two.<sup>144</sup> This creates a path dependency in the structure of delegation. The path dependency would be strongest if family connections were the only basis for entry—for then all of the migrants entering in period one would have been admitted by the family-reunification rule. But even if there remain other bases for admission, such as labor visas, the large fraction of migrants admitted to the United States because of family connections ensures that the feedback mechanism is significant.

The fact that early migrants get to pick later migrants does not itself determine the diversity effect of the delegation. Whether this feedback mechanism results in a diverse set of agents depends significantly on the composition of the migrant pool in the early periods. If the migrants admitted in the first period after the rule's introduction are diverse, their admission will make it more likely that the pool of later migrants is also diverse. But if a homogenous pool of migrants is admitted in the early periods, it becomes increasingly unlikely that the migrants admitted in the future under the system will compose a diverse pool.

This makes the system quite sensitive to shocks during the early periods. If migration during the early period is quite diverse, the system is likely to converge to one that selects a diverse pool of migrants over time (so long as a period-one migrant is likely to pick a period-two migrant similar to herself along whatever dimension we are evaluating diversity). If migration during the early period happens to include a more homogenous group of migrants, the system is likely to replicate that homogeneity over time. In the United States, it appears that just such an early period shock to the composition of the migrant pool is in part responsible for long-term, persistent changes to the demographic effects of the family migration system.

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<sup>143</sup> See US Census Bureau, *Profile of the Foreign-Born Population* at 33 (cited in note 141) (providing native- and foreign-born intermarriage statistics); Sharon M. Lee and Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 *Population Bull.* 1, 16–17 (Population Reference Bureau June 2005), online at <http://www.prb.org/pdf05/60.2newmarriages.pdf> (visited Nov 25, 2012); Matthijs Kalmijn, *Intermarriage and Homogamy: Causes, Patterns, Trends*, 24 *Ann. Rev. Sociology* 395, 410 (1998).

<sup>144</sup> There is a related general feedback loop inherent in all immigration systems, where today's migrants become tomorrow's citizens and voters who will control the future content of immigration law. The mechanism we describe here is different because it is driven by the current immigration rules, rather than by the possibility that immigration law will change in the future because of the political preferences of current migrants.

The years immediately following the adoption of the family quota system saw an unanticipated surge of migrants from Latin America and Asia.<sup>145</sup> The reason for the surge is not fully understood. But whatever its causes, it created a large pool of recent migrants, many of whom had overseas family members they wished to sponsor for visas under the new system. This set in motion a path dependent process whose effects are still felt more than four decades later. As with labor migration, this highlights the importance of paying close attention to the disaggregated structure of delegation in immigration law.

#### IV. US STATES

Recent events have reinvigorated longstanding debates about the role of states in American immigration law. Arizona, Georgia, Alabama, and other states frustrated by the failure of federal immigration reform have passed their own statutes related to immigration enforcement.<sup>146</sup> In an unusual move, the federal government sued Arizona, arguing that the state has no authority to legislate in an arena traditionally reserved to the federal government.<sup>147</sup> The Supreme Court vindicated the federal government's position, striking down the core features of Arizona's law.

The controversy in Arizona might be taken as evidence that the federal government does not want state and local governments involved in immigration enforcement. But the opposite is true. In recent years the federal government has increasingly delegated authority to states to screen immigrants. And this delegation is nothing new. Since the birth of modern immigration law in the 1880s, the federal government has often allowed state and local officials to decide which noncitizens could enter and remain in the United States.<sup>148</sup>

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<sup>145</sup> See US Census Bureau, *Profile of the Foreign-Born Population* at 11 (cited in note 141) (providing the breakdown of immigrants by country of national origin over time).

<sup>146</sup> See Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), 2010 Ariz Sess Laws 113, as amended by HB 2162, 2010 Ariz Sess Laws 211; Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56), 2011 Ala Act 535; Illegal Immigration Reform and Enforcement Act of 2011 (HB 87), 2011 Ga Laws 252; SB 20, 2011 SC Acts & Resol 69; Pub L No 171-2011, 2011 Ind Acts 590; Utah Illegal Immigration Enforcement Act (HB 497), 2011 Utah Laws 21. See also Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, NY Times A1 (Apr 24, 2010) (discussing Arizona SB 1070 and similar statutes in other states); Editorial, *D.I.Y. Immigration Reform*, NY Times WK9 (Mar 20, 2011) (discussing Utah HB 497 and the trend of states passing immigration reform statutes).

<sup>147</sup> See generally *Arizona v United States*, 132 S Ct 2492 (2012). Federal courts have enjoined the implementation of portions of the recent state enactments. See *id* at 2497-98; *Georgia Latino Alliance for Human Rights v Governor of Georgia*, 691 F3d 1250, 1269 (11th Cir 2012).

<sup>148</sup> See Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* 247-48 (North Carolina 1995); Juliet P. Stumpf, *States of Confusion:*

The delegation to state and local officials looks significantly different, however, than the forms of delegation discussed in the preceding Parts. Employers and family members are mostly delegated *ex ante* screening authority—the discretion to pick migrants at the front end of the system. In contrast, the discretion delegated to state and local officials is almost exclusively *ex post* screening authority. This Part describes the ways in which immigration law delegates to state and local officials partial authority to pick, from a large pool of potentially deportable noncitizens, those who will ultimately be deported. It then turns to consider the informational advantages of states that might justify such delegation and considers the agency costs of incorporating state and local officials into the immigrant screening system.

#### A. The Screening Authority of State and Local Officials

To understand the delegation of screening authority to states, it is important to distinguish local variation from delegation. Immigration law frequently relies on local conditions to determine whether a particular noncitizen should be admitted or deported. Consider three prominent examples:

- (1) Federal immigration law explicitly makes variation in local labor market conditions a valid reason to accept or reject a particular migrant's application for a labor visa. To qualify for a visa, an applicant's sponsoring employer must show that it has performed a search and is unable to locate another American worker to fill the position. The search is often local, rather than national, in scope. As we explained in Part II.E.5, the assumption is that immigrant workers can be absorbed without cost to areas that face labor shortages, but will drive down the wages of existing workers if they immigrate to areas without any shortage.<sup>149</sup>

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*The Rise of State and Local Power of Immigration*, 86 NC L Rev 1557, 1569–71, 1593–96 (2008).

<sup>149</sup> Relatedly, local labor market conditions are sometimes the basis for the creation of targeted admissions programs. For example, purported shortages of sugar cane cutters in central Florida were part of what motivated the creation of the H-2A guest worker program in 1986. See Immigration Reform and Control Act of 1986 §§ 301–03, Pub L No 99-603, 100 Stat 3359, 3411–31; Judith Adler Hellman, *Migration in the Americas: Permanent, Cyclical, Temporary, and Forced*, 46 Latin Am Rsrch Rev 235, 243 (Apr 2011). While technically a program of general applicability, nearly all H-2A workers have been sponsored by employers in just a handful of states along the southeastern seaboard. See *Immigrant Workers in US Agriculture: The Role of Labor Brokers in Vulnerability to Forced Labor* 15–17 (Verité June 2010), online at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2174&context=globaldocs> (visited Nov 25, 2012).

(2) The INA permits citizens and lawful permanent residents to sponsor their spouses for green cards.<sup>150</sup> But to determine who counts as a “spouse” for purposes of this valuable federal immigration benefit, the code relies on state family law. Under existing law, a person can be a spouse only if the couple is validly married according to both the law of the state in which the marriage was performed and the law of the state in which they reside (or intend to reside, if the spouse is coming from overseas).<sup>151</sup> Thus, variations in state marriage law can affect a noncitizen’s eligibility for a visa. Historically, this reliance on state law mattered most in instances where states differed over the age of consent or the marriage of related persons.<sup>152</sup> Today, however, the most significant difference between state marriage laws concerns same-sex marriage. While these differences have until recently been unimportant because federal law prohibited same-sex couples from receiving any federal benefit on the basis of their marriage,<sup>153</sup> the Obama administration has recently announced that it believes the federal prohibition is unconstitutional.<sup>154</sup> For a same-sex couple, therefore, the availability of a

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<sup>150</sup> 8 USC §§ 1151(b)(2)(A)(i), 1153(a)(2). As we explained above, a citizen’s spouse is treated more favorably than almost any other immigrant; she is eligible for admission as an LPR solely on the basis of her marriage to an American citizen, and her visa application is exempt from the complex quotas that apply to the vast majority of migrants who enter the United States under other admission rules. A spouse of an LPR is subject to the quota system for family migration, but she too becomes eligible for a green card by virtue of her marriage.

<sup>151</sup> See *Matter of Darwish*, 14 I&N Dec 307, 307–08 (BIA 1973).

<sup>152</sup> See *Matter of Zappia*, 12 I&N Dec 439, 440–42 (BIA 1967).

<sup>153</sup> Defense of Marriage Act (DOMA) § 3, Pub L No 104-199, 110 Stat 2419, 2419 (1996), codified at 1 USC § 7 (defining—under federal law—“marriage” as “only a legal union between one man and one woman as husband and wife,” and “spouse” as only “a person of the opposite sex who is a husband or a wife”).

<sup>154</sup> See Eric H. Holder Jr, Attorney General, Letter to John A. Boehner, Speaker of the US House of Representatives, *Defense of Marriage Act* (Feb 23, 2011), online at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (visited Nov 25, 2012) (announcing the President’s decision “that Section 3 of the Defense of Marriage Act . . . as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment” and his instruction to the Department of Justice (DOJ) not to defend the statute in pending litigation). Prior to the decision of the Obama administration to decline to defend the constitutionality of DOMA, a same-sex couple that married in one of the states permitting such marriages was barred from obtaining an immigration benefit by DOMA. In the wake of the decision not to defend the statute, however, the state of DOMA’s enforcement in the immigration context has been changing rapidly. Because the administration took the position that it would continue to enforce DOMA, even while declining to defend it, US Citizenship and Immigration Services has refused to accept visa applications filed by same-sex couples. See Julia Preston, *Confusion over Policy on Married Gay Immigrants*, NY Times A14 (Mar 30, 2011). Nonetheless, the administration has stayed some (though not all) pending immigration decisions involving claims of spousal-immigration benefits made by same-sex couples. See Julia Preston, *Justice Dept. to Continue Policy against Same-Sex Marriage*, NY Times



green card for a noncitizen spouse may soon turn on whether the state where the couple lives (or wants to live after the noncitizen spouse immigrates) permits same-sex couples to marry.

(3) The deportability of a resident noncitizen often turns on the content of state criminal law. For example, a noncitizen becomes deportable if he is convicted of, among other things, “rape,” “murder,” or a “crime involving moral turpitude” (though the latter counts only if committed within five years of entry).<sup>155</sup> Convictions under state law count, but of course different states use the same label to criminalize different conduct. The crime of rape does not include the same elements in every state, and in many states the formal category of rape has been superseded by a broader offense of “sexual assault.” Immigration law could provide federal definitions of these crimes and thereby render differences in state criminal codes irrelevant. Instead, however, immigration judges and federal courts have long followed an approach—known as the “categorical approach”—that makes the decision about criminal deportability turn on the way these crimes are defined in state criminal law, rather than just on the conduct of the noncitizen.<sup>156</sup>

In each of these examples, screening decisions depend on local conditions. Thus, while immigration law is often described as the archetypical uniform national policy—the federal government often claims in court that its power to regulate migration comes from Congress’s authority to create a “*uniform* rule of naturalization”<sup>157</sup>—immigration law in practice varies from state to state. Nonetheless, while these sources of local variation in federal immigration law raise important

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A15 (May 9, 2011). These decisions have led some judges to suspend deportation in other cases involving same-sex couples as well. See Julia Preston, *Judge Gives Immigrant in Same-Sex Marriage a Reprieve from Deportation*, NY Times A12 (May 7, 2011). For a general discussion of the President’s decision to enforce but not defend DOMA, see Aziz Z. Huq, *Enforcing (But Not Defending) “Unconstitutional” Laws*, 98 Va L Rev 1001, 1021–28 (2012).

<sup>155</sup> 8 USC § 1227(a)(2) (making noncitizens deportable for, among other crimes, “crimes involving moral turpitude,” “controlled substances” violations, and “aggravated felon[ies]”); 8 USC § 101(a)(43) (defining “aggravated felony” to include, among other things, “murder, rape, or sexual abuse of a minor”).

<sup>156</sup> Under a pure categorical approach, the adjudicator does not look to the noncitizen’s conduct at all. It asks instead whether all of the conduct covered by the state criminal statute is a strict subset of the conduct covered by the federal law’s definition of a crime involving moral turpitude. A noncitizen’s deportability will thus hinge on how the state has drafted its criminal law. See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude after Silva-Trevino*, 111 Colum L Rev 313, 314 (2011).

<sup>157</sup> US Const Art I, § 8, cl 4 (emphasis added).

questions,<sup>158</sup> they do not involve the delegation of significant screening authority to state and local governments. States play no role in evaluating the local labor market conditions on which the grant of an employment visa depends.<sup>159</sup> And while states do determine the content of state criminal and family law, it seems highly unlikely that a state would manipulate its criminal or family law in order to change the immigration consequences for migrants living in the state.

It might be tempting to conclude, therefore, that the federal government delegates little screening authority to states. Such a conclusion would be mistaken. In two ways that are centrally important given the modern structure of immigration law, the federal government gives states considerable discretion to decide which noncitizens should be selected for deportation.

First, immigration law's heavy reliance on state criminal convictions to decide whom to deport gives states tremendous ex post screening authority. As we noted above, convictions for certain crimes render noncitizens deportable. But because the fact of conviction and the statute under which a noncitizen is convicted often determine whether immigration consequences attach to criminal conduct, inadmissibility and deportability frequently turn on a state's arresting, charging, and plea practices. For example, county prosecutors often have the option of charging a defendant with at least two offenses, one that will render the defendant deportable and one that will not.<sup>160</sup> And even if the prosecutor charges the defendant with a deportable offense, defense lawyers negotiating a plea agreement can bargain for a conviction that saves the defendant from deportation.

If criminal deportations were not an important part of immigration screening, or if there were little room for local prosecutors to bargain over sentences and offenses, this aspect of immigration law

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<sup>158</sup> One unexplored question is whether immigration law focuses on the right sorts of local conditions. Sometimes it seems to get things backwards. For example, immigration law formally focuses on local labor market conditions in ways that likely underestimate the extent to which the labor market in the United States is national. At the same time, potentially more significant local costs are often treated as formally irrelevant by federal immigration law. Many social services, such as education, are financed predominantly at the state and local level. In theory, therefore, it might make more sense to take these local costs into account rather than the anticipated labor market effects. Yet admission and deportation decisions are not formally responsive to the cost of providing local public goods to immigrants.

<sup>159</sup> 8 USC § 1182(a)(5)(A)(i) (providing that an alien seeking entry into the United States to perform any labor is admissible only if the Secretary of Labor certifies "there are not sufficient workers who are able, willing, qualified" and "available" in "the place where the alien is to perform such skilled or unskilled labor"); 20 CFR § 656.24 (providing the process for labor certification decisions); Aleinikoff, et al, *Immigration and Citizenship* at 362–67 (cited in note 28).

<sup>160</sup> See Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L Rev 1411, 1415, 1422–33 (2005).

would not delegate much discretion to local agents. But neither of these things is true. Criminal deportations make up a large and growing fraction of all removals. In 2010, for example, half of all deportations were of noncitizens with criminal convictions.<sup>161</sup> The Department of Homeland Security (DHS) has also announced that it will further prioritize criminal deportations in coming years while deemphasizing other grounds of removal.<sup>162</sup> In addition, charge and sentence bargaining is a central—perhaps the single most important—feature of the American criminal justice system. Criminal law scholarship has long recognized that plea bargaining's dominance, combined with the dramatic expansion of substantive criminal law, delegates vast swaths of discretion to local officials to decide whom to incarcerate.<sup>163</sup> This same discretion makes it relatively easy for local prosecutors to control a noncitizen's deportability in the plea-bargaining process.<sup>164</sup>

Second, the federal government frequently delegates to states by asking or requiring them to help screen migrants using the formal screening criteria contained in the INA. State involvement in enforcement dates back all the way to the first large-scale immigration restrictions adopted by the federal government—the Chinese Exclusion

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<sup>161</sup> Immigration and Customs Enforcement (ICE) statistics report 387,242 deportations in 2010; 168,532 are described as being of “convicted criminals.” Office of Immigration Statistics, *Immigration Enforcement Actions: 2010* 1, 4 (DHS June 2011), online at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (visited Nov 25, 2012).

<sup>162</sup> See John Morton, Director of ICE, Memorandum for All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (July 17, 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (visited Nov 25, 2012) (instructing immigration customs officials with prosecutorial discretion to pay particular attention to factors such as lengthy criminal records, gang participation, immigration fraud, and general threats to national security); *Oversight of the U.S. Department of Homeland Security, Hearing before the Senate Committee on the Judiciary*, 111th Cong, 1st Sess 199, 207 (Dec 9, 2009) (testimony of Janet Napolitano, Secretary, DHS).

<sup>163</sup> See generally William J. Stuntz, *The Collapse of American Criminal Justice* (Harvard 2010).

<sup>164</sup> While systematic evidence that local prosecutors bargain in order to shape deportation consequences is hard to come by, anecdotal evidence abounds. For example, there is evidence that some local prosecutors are adopting policies designed to mitigate the immigration consequences of criminal prosecution. See, for example, Jeff Rosen, District Attorney of Santa Clara County, Memorandum to Fellow Prosecutors, *Collateral Consequences* (Sept 14, 2011), online at [http://www.ilrc.org/files/documents/unit\\_7b\\_4\\_santa\\_clara\\_da\\_policy.pdf](http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf) (visited Nov 25, 2012) (describing policy to bargain with criminal defendants to avoid immigration collateral consequences where the collateral consequence is significantly greater than the punishment for the crime itself); Editorial, *Track Results of the County's New ICE Policy*, San Jose Mercury News 10A (Oct 27, 2011) (“Rosen . . . implemented an enlightened policy in his office to consider whether a plea bargain might trigger deportation, which would be a disproportionate punishment for some crimes.”).

Act of 1882. When this Act was passed, no federal immigration bureaucracy existed to enforce the law. So Congress turned to local officials. These officials, working in San Francisco and other ports of entry, would interview arriving migrants to determine whether they were subject to exclusion. While federal power was not entirely absent from this process—for example, immigrants whose admission was denied could file a habeas petition in federal court—local officials were frequently frontline enforcers during this early period.<sup>165</sup>

As the federal bureaucracy expanded, the role of states shrank. But over the past few decades, the federal government has increasingly turned again to states as enforcement agents. The paradigmatic modern example is the enforcement authority delegated pursuant to § 287(g) of the immigration code. Enacted as a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>166</sup> (IIRIRA), § 287(g) authorizes the attorney general to enter into agreements with states and local governments to enforce immigration law.<sup>167</sup> Today there are nearly one hundred such agreements, and they authorize two principal types of enforcement activity. The majority of the agreements embody a jail screening model: these agreements, such as the one Los Angeles County entered into in 2005, authorize local officials to screen arrestees for immigration violations when they are booked into jail and then issue detainers against suspected violators.<sup>168</sup> A minority of agreements authorize local officials to screen for status and issue detainers during ordinary policing operations—a street-level enforcement model.

Complementing § 287(g) is DHS's new Secure Communities initiative.<sup>169</sup> Secure Communities is an information-sharing initiative rolled out in 2008.<sup>170</sup> Traditionally, whenever a person is arrested and

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<sup>165</sup> See Salyer, *Law Harsh as Tigers* at 247–48 (cited in note 148).

<sup>166</sup> Pub L No 104-208, 110 Stat 3009, 3009-546.

<sup>167</sup> IIRIRA § 133, 110 Stat at 3009-546 to -563, enacting INA § 287(g), codified at 8 USC § 1357(g).

<sup>168</sup> See, for example, Lance Pugmire, *Immigration Check at Inland Jail Is Okd*, LA Times B3 (Sept 21, 2005) (discussing agreements between federal immigration officials and Los Angeles and San Bernardino counties allowing local law enforcement officials to screen for illegal immigrants).

<sup>169</sup> For a full description of the program, see ICE, *Secure Communities* (DHS 2012), online at [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (visited Nov 25, 2012).

<sup>170</sup> SCOMM is both a successor and a complement to the Criminal Alien Program (CAP), which has been in place since 1991. See Lisa M. Seghetti, Karma Ester, and Michael John Garcia, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 2 (Congressional Research Service Mar 11, 2009), online at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf> (visited Nov 25, 2012). Under CAP, federal immigration agents engaged in jail screening in a number of local jurisdictions around the country. See id; ICE, *Criminal Alien Program* (DHS 2012), online at <http://www.ice.gov/criminal-alien-program> (visited

booked by a state or local law enforcement agency, his fingerprints are taken and forwarded electronically to the FBI. The FBI compares those prints against various national criminal information databases that return a “hit” if the person has a criminal history or outstanding warrants. Under Secure Communities, the federal government forwards to DHS the fingerprints already being routed to the FBI; DHS then compares the person’s fingerprints against a database designed to identify persons who have outstanding immigration violations, such as persons who are unlawfully in the country because they have overstayed their visas, or because they have been previously deported and have not been legally readmitted.<sup>171</sup> If the database identifies an arrestee as a potential immigration violator, Immigration and Customs Enforcement (ICE) notifies the local law enforcement agency and may place a detainer on the person.<sup>172</sup> The detainer requests that the local agency hold the person for forty-eight hours in order to permit ICE to transfer the person to federal custody for the initiation of deportation proceedings.<sup>173</sup> Secure Communities has already been rolled out in more than 3,000 local jurisdictions,<sup>174</sup> and is projected to reach nationwide coverage by the end of 2012.<sup>175</sup> It therefore covers a much broader swath of the country than do existing § 287(g) agreements.<sup>176</sup>

The local discretion embodied in cooperative federalism arrangements like Secure Communities and § 287(g) stems from two facts: First, local police have tremendous arrest discretion—particularly with respect to minor offenses, such as disorderly conduct,

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Nov 25, 2012). Because the program is much more labor intensive than SCOMM, it has had considerably more limited scope than does SCOMM.

<sup>171</sup> See ICE, *Secure Communities* (cited in note 169).

<sup>172</sup> See *id.*

<sup>173</sup> See ICE, *Immigration Detainer—Notice of Action* (DHS Dec 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (visited Nov 25, 2012) (providing a copy of the detainer form). See also 8 CFR § 287.7.

<sup>174</sup> See ICE, *Activated Jurisdictions* (DHS Aug 22, 2012), online at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (visited Nov 25, 2012) (providing current SCOMM participation).

<sup>175</sup> See ICE, *Planned Nationwide Usage of the Biometric Information Sharing Capability by Fiscal Year (2009–2013) \*1* (DHS), online at <http://www.ice.gov/doclib/secure-communities/pdf/sc-dep.pdf> (visited Nov 25, 2012) (providing SCOMM nationwide usage, projected through 2013). Some states, however, have attempted to withdraw from SCOMM. See Peter H. Schuck, *Three States Short of a Secure Community*, NY Times A27 (June 23, 2011) (discussing the attempted withdraw of New York, Massachusetts, and Illinois from SCOMM).

<sup>176</sup> For an explanation of the way in which Secure Communities represents a dramatic expansion of prior programs, see Adam B. Cox and Thomas J. Miles, *Policing Immigration*, 80 U Chi L Rev (forthcoming 2013).

traffic offenses, and the like.<sup>177</sup> Second, there are about eleven million unauthorized migrants living in the United States today.<sup>178</sup> The federal government does not have the capacity or the desire to remove all of these persons who are present in the US in violation of immigration law. For that reason, the act of choosing which among those eleven million to deport effectively determines the substance of the nation's ex post immigrant screening system.<sup>179</sup> By using local arrests as the trigger for screening, programs like Secure Communities lodge authority to initiate screening in the hands of local officials. And this discretionary authority is growing. Secure Communities is still being activated, but in Fiscal Year 2010 the program accounted for over 10 percent of all deportations, and in Fiscal Year 2011 the program accounted for almost 20 percent.<sup>180</sup>

## B. The Advantages of Delegating to States

State and local officials have informational advantages over the federal government on two fronts.

### 1. Identifying acknowledged immigrant violators.

First, states often have more information about the identity and location of potentially deportable noncitizens.<sup>181</sup> For the federal government, locating removable noncitizens is one of the biggest obstacles to deporting them. But states have many more interactions with residents that can serve as opportunities for identifying these individuals.

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<sup>177</sup> For a classic statement of the breadth of police discretion, see generally Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L J 543 (1960). See also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum L Rev 551 (1997).

<sup>178</sup> See *Visa Waiver Program Oversight: Risks and Benefits of the Program*, Hearing before the Subcommittee on Immigration Policy and Enforcement of the House Judiciary Committee, 112th Cong, 1st Sess 72, 72–75 (Dec 7, 2011) (testimony of Jessica M. Vaughan, Director of Policy Studies, Center for Immigration Studies). But see ICE, *Secure Communities* (cited in note 169).

<sup>179</sup> See Cox and Posner, 59 Stan L Rev at 836–43 (cited in note 12). See also Cox and Rodríguez, 119 Yale L J at 519–28 (cited in note 6).

<sup>180</sup> Compare ICE, *Removal Statistics* (DHS), online at <http://www.ice.gov/removal-statistics> (visited Nov 25, 2012), with ICE, *Secure Communities: IDENT/IAFIS Interoperability Statistics 2* (DHS Oct 14, 2011), online at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf) (visited Nov 25, 2012).

<sup>181</sup> We say “potentially deportable” here because states are almost certainly worse than the federal government at assessing a noncitizen’s actual deportability. Deportability turns on the application of the incredibly complex immigration code, something most local officials have no training to do. But identifying violations of state criminal law—rendering migrants potentially deportable—is well within the states’ expertise.

In large part this is because of the central place that criminal enforcement plays in initiating immigration screening today. As we explained above, state criminal convictions often make noncitizens deportable—and states obviously have more information about those convictions than the federal government does.<sup>182</sup> But even more significant than convictions are arrests. In theory, every arrest leads to the collection of information about a person's identity. This identification information can be used by the federal government to determine whether the arrestee is living in the United States in violation of immigration law—because he sneaked across the border, overstayed his visa, or violated some more technical requirement of immigration law.<sup>183</sup>

State and local law enforcement officials make many more arrests than does the federal government. From the federal government's perspective, these encounters are essentially free. The only cost is the cost of comparing the identification information collected by the state with information that the federal government has about immigration violators. Without these encounters federal officials would have to go out and try to locate immigration violators on their own, using costly workplace raids, roving patrols along the highways in border areas, passenger screening by ICE agents on trains and buses, or other strategies.

Secure Communities and § 287(g) thus both capitalize on a local informational advantage, but they do so in different ways. Secure Communities has vastly broader—nearly nationwide—coverage.<sup>184</sup> Wider participation means more information for the federal government. In another respect, however, Secure Communities ignores some information local officials might possess. Secure Communities relies on local officials for an arrestee's identity but not for information about immigration status. The arrestee's status is evaluated on the basis of a biometric match with a federal database of immigration violators. This will lead to plenty of false negatives, because many noncitizens who are living in the United States in violation of

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<sup>182</sup> See notes 155–56 and accompanying text.

<sup>183</sup> It is possible, of course, that the law could prohibit the collection of such identification information during stops and arrests. At least in the arrest context, few constraints appear to exist in practice. We focus on arrests here for that reason—and because SCOMM, which we discuss below, is an information collection system triggered by an arrest rather than simply by a stop. See Part IV.D.2.

<sup>184</sup> See ICE, *Activated Jurisdictions* (cited in note 174) (providing current SCOMM participation); ICE, *Fact Sheet: Delegation of Immigration Authority; Section 287(g) Immigration and Nationality Act* (DHS Oct 16, 2012), online at <http://www.ice.gov/news/library/factsheets/287g.htm> (visited Nov 25, 2012) (providing an up-to-date list of participating entities that have mutually signed § 287(g) agreements with ICE).

immigration law have no fingerprints in the federal database that would lead to a hit (those who have entered without inspection and not previously been removed are a good example). In contrast, local officials screening for status under § 287(g) agreements can base their screening decisions on other grounds, such as the arrestee's responses to questions about where he was born and how he entered the country.

## 2. Assessing immigrant desirability.

Second, like employers and family members, state and local officials may also have better information than the federal government about an immigrant's desirability. In some cases this will be true even if the federal government does not want screening decisions to turn on local conditions. Consider, for example, the possibility that the federal government wants to remove noncitizens who commit particularly serious crimes. State and local criminal justice systems that interact with people charged and convicted of crimes will, in general, have far richer information about the offender than will the federal government. The federal government can, of course, rely on information generated by the state criminal justice system to evaluate the seriousness of the crime—looking at the statute under which the person was convicted, or at the sentence handed down. But the judge who sentences a defendant will often have a more nuanced sense of the defendant's culpability and other characteristics that bear on the noncitizen's desirability in the eyes of the federal government.<sup>185</sup>

Perhaps more important, however, are situations in which the federal government wants immigrant screening conditions to turn in part on local conditions. As we explained above, there are already a

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<sup>185</sup> For most of the twentieth century, immigration law had a procedure reflecting this fact—a policy known as Judicial Recommendation against Deportation (JRAD). See Immigration Act of 1917 § 19, Pub L No 64-301, ch 29, 39 Stat 874, 889–90, repealed by the Immigration Act of 1990 § 505, Pub L No 101-649, 104 Stat 4978, 5050; *Janvier v United States*, 793 F2d 449, 452–56 (2d Cir 1986). JRAD authorized the sentencing judge in both state and federal prosecutions to make a recommendation that a convicted noncitizen not be deported. This power, which was binding on the executive, was understood to reflect the superior information possessed by the sentencing judge. See, for example, Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 Cal L Rev Cir 1, 14–15 (2011) (reasoning that the procedure was preferable because it “allowed the judge in the criminal case, the adjudicator most familiar with the facts, to weigh whether deportation should be part of the penalty”); Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 La Raza L J 31, 39–40 (2010) (“Because the criminal court judge spent more time on the criminal case and was more familiar with all of the circumstances of the case, the criminal court judge was seen as more knowledgeable about these factors than the immigration court judge.”).



number of ways in which immigration law varies depending on local conditions. In recent years, a number of scholars have argued that such local variation is a virtue because migration affects local communities in different ways.<sup>186</sup> While this scholarship has focused principally on the question whether immigration law *should* be responsive to local conditions, it should be clear that the relevance of local conditions also raises the question how a nation might design immigration law to be responsive to these conditions.

To the extent that immigrant desirability turns on local norms or conditions, state and local governments are likely to have superior information about those conditions. They may better understand local labor markets, have a better sense of the fiscal burdens immigration places on the provision of local public goods, and so on. From an informational perspective, this argues in favor of delegating screening authority to these state and local actors with superior information.

### C. Disadvantages of Delegation

The disadvantages of delegation should, by now, be familiar. The central concern is that state and local officials may have different first-order preferences about migration than does the federal government. Of course, in much writing about federalism, this divergence is considered a virtue. Decentralizing power, and giving decisional autonomy to state or local officials, is considered desirable precisely because it permits them to pursue first-order goals that are different than (and sometimes at odds with) those pursued by the federal government.<sup>187</sup> Because our focus is on principal-agent problems, however, this Article is concerned only with those situations where the federal government wants to capitalize on the informational advantages of state and local officials while retaining control over the first-order questions about how many, and what types, of noncitizens should be admitted or removed.<sup>188</sup>

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<sup>186</sup> See, for example, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich L Rev 567, 580–90 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U Chi Legal F 57, 59; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 Conn L Rev 1627, 1635–36 (1997).

<sup>187</sup> See, for example, Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903, 924 (1994) (“In a unitary system, the central authority will generally have a single goal . . . [b]ut true federalism allows governmental sub-units to choose different goals.”); Heather K. Gerken, *Forward: Federalism All the Way Down*, 124 Harv L Rev 4, 21–44 (2010).

<sup>188</sup> For the seminal evaluation of federalism as a form of administrative decentralization, see Rubin and Feeley, 41 UCLA L Rev at 910–27 (cited in note 187).

Within this framework, states are useful only because they can help the federal government locate noncitizens who fit the federal government's ultimate first-order criteria. Yet states might use their authority to skew the federal government's enforcement priorities because of local preferences regarding migration policy. In other words, the local agents may have better information, but they may also be biased. Arizona's concern about current immigration levels might reflect the fact the state has superior information about the costs of migration. This was one of the claims made by Texas back in the days of *Plyler v Doe*,<sup>189</sup> when it claimed that it needed to exclude some immigrants (those who lacked status) from the school system because of the costs they imposed on the system.<sup>190</sup> But Arizona's resistance might also be the product of its citizens' preferences regarding migration. They might simply favor much lower levels of immigration than other voters around the country—perhaps for ideological reasons, or perhaps because they believe that Arizona bears the brunt of the costs of US immigration policy without reaping many of the benefits.

One way the federal government might try to ameliorate this problem is by limiting the states to supplying the federal government with information regarding local conditions. As with the identification of immigrant violators, this preserves the federal government's ability to monitor the states. But if the states have superior information, it is far from clear how effective this monitoring can be. In this respect information about local conditions is different from information about violators: much of the value of that information lies in the identification of individuals in contexts where the federal government could itself determine deportability. Monitoring in that context may be relatively easier for the federal government.

A second strategy is to rely on behavior by states that provides information about local conditions but is inelastic to the states' preferences about immigration law. Relying on such behavior makes it much more difficult for the state agents to misrepresent local conditions in order to bias immigration policy toward their state's preferences. For example, if the federal government wants immigration benefits for family members to turn on state understandings of who counts as family, then relying on state family law may be a relatively good way of getting information about local norms regarding family structure without

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<sup>189</sup> 457 US 202 (1982).

<sup>190</sup> *Id.* at 229 (plurality) (noting Texas's argument "that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on [its] ability to provide high-quality public education").

the risk of the state rigging that information because it was especially pro- or anti-immigrant. It is unlikely that a state will rewrite its family law just to increase or decrease deportations.

#### D. The Structure of Delegation to the States

##### 1. Ex ante versus ex post screening.

Perhaps the most important feature of the states' delegated immigration authority is how it differs from the authority given to families and employers. The authority is almost exclusively ex ante for families, and it is predominantly so for employers. But as the above discussion demonstrates, state discretion resides at the back end of the system.<sup>191</sup>

This structure could contribute to some of the pathologies we see today. For example, because ex ante and ex post screening mechanisms are substitutes, denying states any ex ante screening authority might lead them to augment their ex post screening efforts, as we see in Arizona, Alabama, and elsewhere.

Moreover, the system could in theory be structured differently. If states have better information about local labor markets, or about the cost of providing local public goods to migrants, the government could delegate them ex ante screening authority more akin to that given to employers and families. States could be given some authority to hand out employment visas, or even given a fixed number of entry visas to distribute as the state saw fit. Some other countries, including Canada, have experimented with similar approaches,<sup>192</sup> and Peter Schuck made a similar proposal a few years back.<sup>193</sup>

The obvious problem with this approach is that immigrants might cross state borders if entry visas are not restricted to a particular state.<sup>194</sup> This is another version of the multiple-agents problem encountered with employers and families.<sup>195</sup> It is also a problem familiar in the large literature on regulatory federalism. The general concern in that literature is that states will compete with each other in socially undesirable ways, impose externalities on one another, and so on.<sup>196</sup>

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<sup>191</sup> See Part IV.A.

<sup>192</sup> See Kevin Tessier, *Immigration and the Crisis in Federalism: A Comparison of the United States and Canada*, 3 Ind J Global Legal Stud 211, 222–23 (1995).

<sup>193</sup> See Schuck, 2007 U Chi Legal F at 68–70 (cited in note 186).

<sup>194</sup> Schuck, who has written widely about the virtues of federalism, overlooks this central downside. See *id.*

<sup>195</sup> See Parts II.F and III.C.

<sup>196</sup> See, for example, Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* 84–85 (Michigan 2008).

Here, the problem arises because immigration visas are, at least in the American system, a grant of authority to reside anywhere in the United States, not permission to reside in only one state. Moreover, after a noncitizen is admitted, American constitutional law may prohibit the government from imposing formal restrictions on the ability of migrants to travel between states.<sup>197</sup> Given this, there is a serious concern that internal mobility will undercut the possibility of immigration law varying in response to local conditions.

One thing to note is that this problem is not unique to immigration law. It is often thought to be—perhaps because immigration law leads people to focus explicitly on the effects of mobility and exit. But mobility poses a problem for other forms of regulatory decentralization as well. It is, for example, a longstanding obsession of the literature on corporate law.<sup>198</sup>

Moreover, immigration law often restricts mobility much more than it initially appears. It is true that a visa formally provides permission to reside anywhere in the United States. But employment visas often effectively limit an immigrant to working with a single employer. This will often completely control the state in which the immigrant resides. Consider the various temporary farm worker programs that the United States has employed during the twentieth century. In many of these programs, including the infamous Bracero program and the modern H-2A program, the immigrant's visa is tied to a single employer who is bringing the worker to work in a particular place.<sup>199</sup> The immigrant's admission is temporary, often lasting only a few months, and there is no visa portability. While workers are not prohibited from crossing state lines, as a practical matter their temporary admission, fixed place of employment, and lack of visa portability combine with their working conditions and economic status to effectively limit their stay to one state.

The de facto state-specific nature of at least some labor visas might make it possible to solve the externalities problem for temporary workers. Perhaps it would be possible even to make these visas expressly state-specific. But it is inconceivable to imagine this solution for permanent employment visas because it would be deeply inconsistent with the modern structure of American federalism to have

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<sup>197</sup> See, for example, *Saenz v Roe*, 526 US 489, 500–07 (1999). Some states, such as China, do seriously limit internal migration, but no modern democracies formally limit internal mobility. See Delia Davin, *Internal Migration in Contemporary China* 39–48 (St Martin's 1998).

<sup>198</sup> See, for example, Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* 266 (Harvard 1996).

<sup>199</sup> See Ngai, *Impossible Subjects* at 127–67 (cited in note 85) (discussing the Bracero program's rules); 8 USC § 1188.

state-specific citizenship.<sup>200</sup> Moreover, the United States lacks features common in other countries—like language segregation across provinces—that can serve as de facto barriers to internal mobility. This is why the Canadian example relied on by Schuck is largely inapposite.<sup>201</sup> While Canada's Charter of Rights and Freedoms does protect the internal mobility of citizens and permanent residents,<sup>202</sup> Quebec's status as the nation's sole French-speaking province partially insulates its labor market from the rest of the country. For this reason, French-speaking migrants admitted by Québec pursuant to its delegated authority are less likely to relocate to other provinces, ameliorating the potential spillovers associated with Quebec's autonomous choices regarding labor migration.

## 2. Secure Communities and other cooperative enforcement regimes.

In the absence of ex ante screening authority, cooperative enforcement regimes represent the most significant forms of delegation to state and local officials. Secure Communities and § 287(g) highlight different institutional approaches to mitigating the agency problems associated with this delegation. From the perspective of the principal—the federal government—Secure Communities has some significant advantages over § 287(g) that reduce the risk of both error and bias by the state and local screeners. These advantages may help explain why the federal government has recently moved aggressively to expand Secure Communities, while § 287(g) is used on a much more limited basis.

Consider first the risk of error. Section 287(g) arrangements generally require that the agents possess far more expertise than does Secure Communities. Under § 287(g), local officers are deputized to

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<sup>200</sup> See Eric Foner, *Reconstruction: America's Unfinished Revolution: 1863–1877* 258 (Harper 1988).

<sup>201</sup> CIC, *Canada–Québec Accord Relating to Immigration and Temporary Admission of Aliens* (Feb 5, 1991), online at <http://www.cic.gc.ca/english/departement/lawspolicy/agreements/quebec/can-que.asp> (visited Nov 25, 2012) (“Québec has sole responsibility for the selection of immigrants destined to that province and Canada has sole responsibility for the admission of immigrants to that province.”); Regulation Respecting the Selection of Foreign Nationals, RRQ ch I-0.2, r 4 (July 6, 2012), online at [http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/I\\_0\\_2/I0\\_2R4\\_A.HTM](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/I_0_2/I0_2R4_A.HTM) (visited Nov 25, 2012) (Québec immigration regulation setting out rules for admission).

<sup>202</sup> See Canadian Charter of Rights and Freedoms, c. 6(2), online at <http://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf> (visited Nov 25, 2012) (“Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.”).

make the initial screening decision, deciding on the basis of their knowledge of immigration law whether a particular person is a noncitizen who is in violation of immigration law.<sup>203</sup> This screening might take place during an interview in a county jail.<sup>204</sup> Or, where local law enforcement officials have been authorized to make arrests for civil immigration violations, the screening might take place on the street or during a traffic stop.<sup>205</sup> Because the initial screening decision requires local officers to understand and apply an immigration code that is notoriously complex, the risk of error arises.

The Justice Department often attempts to reduce the risk of error through relatively direct supervision: the federal government attempts to draft agreements that specify more precisely what is expected of local agents, the agents are required to complete training before engaging in immigration enforcement, and the Justice Department tries to monitor the agents to identify bad behavior.<sup>206</sup> Secure Communities, however, reflects a very different model: the delegation to local agents is more constrained, because their role in the screening process is only to pass identification information about arrestees along to the federal government. This eliminates the need for local officials to have any knowledge about immigration law. And one would expect that screening through the federal database, backed by individual judgment of federal immigration officers who must decide whether to issue a detainer when the database returns a hit, would almost certainly produce fewer errors than screening by local officials with little training and many duties unrelated to immigration enforcement.

Secure Communities also does a better job of preventing local officials from biasing the federal government's enforcement priorities, particularly among local governments who are inclined to shirk or who

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<sup>203</sup> 8 USC § 1357(g).

<sup>204</sup> For example, the § 287(g) resolution passed by Prince William County, Virginia in 2007 requires officers to check the residency status of anyone in police custody who they suspect is an illegal immigrant. See Nick Miroff, *Pr. William Passes Softened Rules on Illegal Immigration*, Wash Post A1 (July 11, 2007). See also note 168.

<sup>205</sup> For example, the now-revoked § 287(g) implementation in Maricopa County, Arizona, authorizes officers to check the residency status of anyone pulled over for any traffic violation. See Randal C. Archibold, *Arizona County Uses New Law to Look for Illegal Immigrants*, NY Times A19 (May 10, 2006).

<sup>206</sup> See, for example, ICE, *Memorandum of Agreement* (DHS Oct 2009), online at [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gmaricopacountyso102609.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf) (visited Nov 25, 2012) (providing the § 287(g) Memorandum of Agreement signed by Maricopa County). See also Office of Public Affairs, *Justice Department Settles Lawsuit with Maricopa County Sheriff's Office* (DOJ June 2, 2011), online at <http://www.justice.gov/opa/pr/2011/June/11-crt-722.html> (visited Nov 25, 2012).

consider themselves “sanctuary cities.”<sup>207</sup> Secure Communities is different from § 287(g) in a way that is central to the agent’s discretion: Secure Communities participation is basically mandatory, while § 287(g) required individual jurisdictions to opt into detailed agreements with DHS in order to participate.<sup>208</sup> To be clear, there was initially some confusion about whether Secure Communities is formally mandatory, and some counties and states announced early on that they would not participate in the program.<sup>209</sup> But DHS eventually clarified that the program is indeed mandatory.<sup>210</sup> And even if it were not, DHS has shifted the default for participation with tremendous effect. In practice there is no evidence that jurisdictions have been able to opt out of participation, and ICE is rapidly rolling out the program around the country. Since its inception in the fall of 2008, DHS has activated all but a handful of counties in the United States, and the agency predicts that it will activate these remaining counties by the end of 2012.<sup>211</sup> In contrast, after fifteen years of existence the § 287(g) program still has fewer than one hundred participating jurisdictions.<sup>212</sup> Thus, reluctant enforcement agents cannot easily avoid assisting the federal government with enforcement the way they could under § 287(g).

Even if we focus only on those jurisdictions that do participate, Secure Communities constrains local discretion more than § 287(g). Because § 287(g) agreements sometimes give local officials free-standing authority to enforce immigration law, it confers considerable discretion on these officials to decide when and where to target enforcement resources. Secure Communities, on the other hand, piggybacks on local arrests that, in theory, are already taking place for other reasons. Thus, it provides fewer opportunities for local officials with different preferences to bias enforcement priorities.

Fewer opportunities do not mean, of course, no opportunities. While the federal government would ideally prefer state policing behavior be inelastic to the decision to layer immigration enforcement on top of criminal enforcement, it cannot ensure that this is true. Local officials still control whether a person is screened by Secure

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<sup>207</sup> See Seghetti, Ester, and Garcia, *Enforcing Immigration Law* at 26 (cited in note 170) (providing a discussion of “sanctuary cities”) (quotation marks omitted).

<sup>208</sup> See 8 USC § 1357(g).

<sup>209</sup> See Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, NY Times A18 (May 6, 2011).

<sup>210</sup> See note 176.

<sup>211</sup> See ICE, *Secure Communities: The Basics* (DHS Aug 31, 2012), online at [http://www.ice.gov/secure\\_communities#top](http://www.ice.gov/secure_communities#top) (visited Nov 25, 2012).

<sup>212</sup> See ICE, *Activated Jurisdictions* (cited in note 174); ICE, *Fact Sheet: Delegation of Immigration Authority* (cited in note 184) (providing an up-to-date list of participating entities that have signed § 287(g) agreements with ICE).

Communities, because screening requires arrest and local officials decide whom to arrest. A central question, therefore, is whether state or local officials will change their local policing behavior in response to the implementation of Secure Communities in their jurisdictions.

Control over arrest authority appears to provide greater opportunities for local agents who would prefer more immigration enforcement than for those who would prefer less. It is hard to imagine that the Chicago police would forego arrests in order to prevent persons from being screened through Secure Communities. Yet it is not terribly difficult for a local government to arrest persons precisely so that they will be screened. As criminal justice scholars frequently note, local officials have tremendous arrest discretion.<sup>213</sup> And the arrest need not lead to a conviction, or even to formal charges, for the arrestee to be flagged and placed in removal proceedings. Thus, Secure Communities's reliance on arrests as the screening trigger affords local officials more discretion than they would have if the trigger were located at a later point in the criminal process, such as following a conviction.

While this discussion suggests that Secure Communities may more effectively discipline sanctuary-city agents than immigration-restrictionist agents, an asymmetry in the federal government's ability to monitor local agents cuts in the opposite direction. When the federal government delegates to local agents it often has somewhat asymmetrical review authority because of the nature of immigration decisions. In the early days of immigration enforcement, decisions by local officials to deny admission were subject to federal court review, because an alien "in custody" by virtue of his denial of admission could seek habeas review.<sup>214</sup> But grants of admission were not subject to judicial review and as a practical matter were likely subject to essentially no oversight.

Today the situation is reversed. The federal government can decline to initiate proceedings against someone flagged through Secure Communities.<sup>215</sup> But decisions by a local cop not to arrest a person pursuant to his § 287(g) authority, or not to arrest a person whom he suspects will be flagged by Secure Communities's database after booking, or a decision by a local prosecutor to reduce or drop charges that he knows will make a defendant deportable, are largely unreviewable by

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<sup>213</sup> See Goldstein, 69 Yale L J at 543–44 (cited in note 177).

<sup>214</sup> See Salyer, *Laws Harsh as Tigers* at 247–48 (cited in note 165) (discussing habeas review with respect to the Chinese Exclusion Act).

<sup>215</sup> See ICE, *Secure Communities: The Secure Communities Process* (DHS Aug 31, 2012), online at [http://www.ice.gov/secure\\_communities/#](http://www.ice.gov/secure_communities/#) (visited Nov 25, 2012).



federal authorities. And, in practice, some local governments have begun to adopt similar policies. Both Cook County, Illinois, and Santa Clara County, California, for example, recently announced that they would decline to comply with requests by the federal government that they hold a person who has been flagged by Secure Communities.<sup>216</sup> In this fashion, some shirking by local agents intended to reduce the level of immigration enforcement is more difficult than overzealous enforcement behavior for the federal government to monitor.<sup>217</sup>

### 3. Criminal grounds of removal.

In addition to cooperative enforcement, the immigration code's reliance on state criminal convictions also delegates substantial authority to states. Charging and plea-bargaining practices shape immigration outcomes. In some ways this delegation raises trade-offs that are similar to those raised by Secure Communities and § 287(g). There is, however, an important difference: the criminal deportation rules use a conviction as the trigger for screening, while Secure Communities relies on arrests.

This difference imposes a potentially more difficult monitoring problem on the federal government, because it does not have access to a "true" measure of criminal culpability. Instead, it is forced to rely on the outcome of the plea-bargaining process.<sup>218</sup> Nonetheless, tying the delegation to convictions can make it costly for the state to bias its criminal justice outcomes in order to affect immigration policy. Handing down a heftier sentence to ensure deportability means that the state has to pay to incarcerate the person for a longer period. This is because the INA prohibits the removal of a person before

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<sup>216</sup> See *Policy for Responding to ICE Detainers*, Cook County Ordinance § 46-37 (Sept 7, 2011), online at [http://library.municode.com/HTML/13805/level4/PTIGGEOR\\_CH46LAEN\\_ARTIISH\\_DIV1GE.html#PTIGGEOR\\_CH46LAEN\\_ARTIISH\\_DIV1GE\\_S46-37POREI](http://library.municode.com/HTML/13805/level4/PTIGGEOR_CH46LAEN_ARTIISH_DIV1GE.html#PTIGGEOR_CH46LAEN_ARTIISH_DIV1GE_S46-37POREI) CDE (visited Nov 25, 2012); *Civil Immigration Detainer Requests*, Santa Clara County Board of Supervisors Policy Manual § 3.54 (Oct 18, 2011), online at <http://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP3.pdf> (visited Nov 25, 2012).

<sup>217</sup> For a discussion of this general problem in enforcement regimes, see Dhammika Dharmapala, Nuno Garoupa, and Richard H. McAdams, *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure* \*28–29 (unpublished working paper, Feb 15, 2011), online at [http://economics.stanford.edu/files/McAdams2\\_24.pdf](http://economics.stanford.edu/files/McAdams2_24.pdf) (visited Nov 25, 2012).

<sup>218</sup> This is clearly the case under the categorical approach to evaluating criminal convictions. See note 156 and accompanying text. But even if immigration judges abandoned the categorical approach and tried to suss out the underlying conduct by the noncitizen, they would typically have little more than the plea- and sentencing-related documents on which to rely.

the completion of his or her sentence.<sup>219</sup> This restriction on removal was recently criticized by Schuck, who argued that it should be changed in order to save on the costs of incarceration.<sup>220</sup> But he misses the fact that these costs may have important disciplining effects on state and local prosecutors. Without this rule it would be far easier for state and local prosecutors to skew criminal justice outcomes in order to affect immigration policy.

### CONCLUSION

Canadian-style centralized systems of migrant screening are popular outside the United States, and to many people they seem more rational than the American system, which relies heavily on delegated authority to various agents. However, the American system can be explained as a decentralized system that harnesses the private information of various stakeholders by delegating authority to them to select migrants subject to various constraints.

Whether the American system is in fact superior to a more centralized immigration system is an empirical question, which we have not tried to answer as it would take us far afield. But it is worth observing that the United States has enjoyed extraordinary success in replenishing its population with waves of migrants who have integrated into society quite successfully. This experience can be compared favorably to that of Europe, where some countries have found themselves with large groups of unassimilated migrants and their children, whose failure to assimilate has become an explosive political issue. We cannot prove that these different outcomes show that the US system is superior, but they are highly suggestive.

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<sup>219</sup> 8 USC § 1231(a)(4)(A) (“In general . . . the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment.”).

<sup>220</sup> Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy* \*53–56 (Yale Law School Public Law Working Paper No 266, Mar 14, 2012), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1805931](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805931) (visited Nov 25, 2012).

